FOR REFERENCE USE IN
THE LIBRARY ONLY.

LEEDS POLYTECHNIC
LIBRARY

LEEDS POLYTECHNIC
LIBRARY

LEEDS BECKETT UNIVERSITY
LIBRARY
TELEPEN
7L 0276995 0
DISCARDED

THE LAW REPORTS

20 Chancery Division

ISBN 0 406 09105 6

This compilation

© The Incorporated Council of Law Reporting
for England and Wales
and
Butterworth & Co. (Publishers) Ltd.
1973

Reprinted by photolitho in Great Britain by
Compton Printing Ltd., London and Aylesbury

This Reprint of
THE LAW REPORTS
is published in collaboration with
THE INCORPORATED COUNCIL OF LAW REPORTING
FOR ENGLAND AND WALES
by
BUTTERWORTH & CO. (PUBLISHERS) LTD.
88 KINGSWAY
LONDON WC2B 6AB

NOTE. This Reprint is a photographic reproduction of the original volume apart from the Tables of Cases, Statutes and Statutory Instruments and the Subject Index, which are omitted in view of the facilities provided by modern text books and other works of reference

THE

LAW REPORTS.

Under the Superintendence and Control of the
INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES.

Supreme Court of Judicature.

CASES DETERMINED IN THE

CHANCERY DIVISION

AND IN

BANKRUPTCY AND LUNACY,

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

EDITOR—G. W. HEMMING, Q.C.

REPORTERS.

Court of Appeal	H. CADMAN JONES, MARTIN WARE, W. LLOYD CABELL,	*Barristers-at-Law.*
V.-C. Bacon	J. B. DAVIDSON, F. G. A. WILLIAMS,	*Barristers-at-Law.*
V.-C. Hall	T. F. MORSE, W. WORSLEY KNOX,	*Barristers-at-Law.*
Mr. Justice Fry	W. LLOYD CABELL, CHALONER W. CHUTE,	*Barristers-at-Law.*
Mr. Justice Kay	T. W. GUNNING, CHARLES MARETT,	*Barristers-at-Law.*
Mr. Justice Chitty	G. I. FOSTER COOKE, GEORGE MURRAY,	*Barristers-at-Law.*
C. J. Bacon	J. B. DAVIDSON, F. G. A. WILLIAMS,	*Barristers-at-Law.*

VOL. XX.

1881-82.—XLV. VICTORIÆ.

LONDON:
Printed and Published for the Council of Law Reporting
BY WILLIAM CLOWES AND SONS, LIMITED,
DUKE STREET, STAMFORD STREET; AND 14, CHARING CROSS.
PUBLISHING OFFICE, 27, FLEET STREET, E.C.

1882.

710 276995 -0

LEEDS POLYTECHNIC
LEEDS BECKETT UNIVERSITY
191058
DISCARDED
3775X
- 4 SEP 1973
5344.4207

Lord Selborne,	*Lord Chancellor.*
Sir George Jessel,	*Master of the Rolls.*
Sir Richard Baggallay,	*Lords Justices of the Court of Appeal.*
Sir William Baliol Brett,	
Sir Henry Cotton,	
Sir Robert Lush,	
Sir Nathaniel Lindley,	
Sir John Holker,	
Sir C. S. C. Bowen,	
Sir James Bacon,	*Vice-Chancellors.*
Sir Charles Hall,	
Sir Edward Fry,	*Justices of High Court, attached to Chancery Division.*
Sir E. E. Kay,	
Sir J. W. Chitty,	
Sir James Bacon,	*Chief Judge in Bankruptcy.*
Sir Henry James,	*Attorney-General.*
Sir F. Herschell,	*Solicitor-General.*

ERRATA.

Page	*Line*	*For*	*Read*
687	11	*Finlay Knight*	*Frank Evans*
721	17 & 18	delete "Agents for *W. Cousins, Leeds.*"	
773	10 of headnote	subject to	with

The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1882, will be as follows:—

In the First Series,
19 Ch. D.

In the Second Series,
8 Q. B. D. 7 P. D.

In the Third Series,
7 App. Cas.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

A.

	PAGE
Albion Life Assurance Society, *In re.* Sanders' Case – –	403
Allen, *Ex parte.* *In re* Fussell –	341
Attorney-General *v.* Dorking (Guardians of Poor of Union of) – – – – –	595
——— *v.* Gaskill –	519

B.

Baker, *In re.* Collins *v.* Rhodes	230
Ball, *Ex parte.* *In re* Parnell –	670
Barrow, Broadbent *v.* *In re* Ovey – – – –	676
Barstow, Fowler *v.* – – –	240
Beall, Quartz Hill Consolidated Gold Mining Company *v.* –	501
Bennett *v.* Bowen. *In re* Bowen	538
Berdan *v.* Greenwood –	764, n.
Bidder *v.* McLean – – –	512
Biggs *v.* Peacock – – –	200
Bowen, *In re.* Bennett *v.* Bowen	538
———, Bennett *v.* *In re* Bowen	538
Boyse, *In re.* Crofton *v.* Crofton	760
Brewer *v.* Yorke – – –	669
Broadbent *v.* Barrow. *In re* Ovey – – – –	676
Brown, Upton *v.* – – –	731

C.

Cambrian Mining Company, *In re* – – – – –	376
Carter *v.* White – – –	225
Chadwick, Smith *v.* – –	27
Chambers, Hunt *v.* *In re* Martin	365
Chatterton, Jarmain *v.* – –	493
Child, *Ex parte.* *In re* Ottaway	126

PAGE

Clagett, *In re.* Fordham *v.* Clagett – – – 134, 637
———, Fordham *v.* *In re* Clagett – – – 134, 637
Clifford, Morley *v.* – – – 753
Collins *v.* Rhodes. *In re* Baker 230
Cooper, *In re.* Cooper *v.* Vesey 611
——— *v.* Crabtree – – – 589
——— *v.* Vesey. *In re* Cooper 611
Cotterell, Shardlow *v.* – – 90
Crabtree, Cooper *v.* – – 589
Craig, Scottish Widows' Fund *v.* 208
Crofton *v.* Crofton. *In re* Boyse 760
Cross, *In re.* Harston *v.* Tenison 109
Curtis *v.* Sheffield – – – 398

D.

Dening, Sotheran *v.* – – 99
D'Epineuil (Count), *In re* (1). Tadman *v.* D'Epineuil – – 217
——— (2). Tadman *v.* D'Epineuil – – 758
———, Tadman *v.* *In re* Count D'Epineuil (1) – – 217
——— *v.* *In re* Count D'Epineuil (2) – – 758
Diamond Rock Boring Company, Truscott *v.* – – – 251
Dickinson, *In re.* *Ex parte* Rosenthal – – – – 315
Dorking (Guardians of Poor of Union of), Attorney-General *v.* 595

F.

Fordham *v.* Clagett. *In re* Clagett – – – – 134, 637
Fowler *v.* Barstow – – – 240
Francis *v.* Hayward – – 773
Fussell, *In re.* *Ex parte* Allen 341

G.

Garnett, Holroyde *v.* – – 532
Gaskill, Attorney-General *v.* – 519
General Financial Bank, *In re* – 276
General Share and Trust Company *v.* Wetley Brick and Pottery Company – 130, 260

PAGE

German Date Coffee Company, *In re* – – – – – 169
Gillam, Golden *v.* *In re* Johnson 389
Golden *v.* Gillam. *In re* Johnson 389
Gomm, London and South Western Railway Company *v.* – 562
Gosling, *In re.* *Ex parte* Pitt – 308
Great Britain Mutual Life Assurance Society, *In re* – – 351
Greenwood, Berdan *v.* – 764, n.
Guerrier, *In re.* *Ex parte* Leslie 131

H.

Hancock, Turner *v.* – – 303
Harper, *Ex parte.* *In re* Pooley 685
Harston *v.* Tenison. *In re* Cross 109
Harwood, *In re* – – – 536
Haunchwood Brick and Tile Company, Midland Railway Company *v.* – – – 552
Haven Gold Mining Company, *In re* – – – – – 151
Hayward, Francis *v.* – – 773
Hobbs *v.* Midland Railway Company – – – – – 418
Hodges *v.* Hodges – – – 749
Holliday, Watson *v.* – – 780
Holroyde *v.* Garnett – – 532
Hudson, *In re.* Hudson *v.* Hudson – – – – – 406
——— *v.* Hudson. *In re* Hudson – – – – – 406
Hull Railway and Dock Act, *In re.* *Ex parte* Rector of Kirksmeaton – – – – 203
——— Company, Wilkinson *v.* – – 323
Hunt *v.* Chambers. *In re* Martin 365
Hurd, Redgrave *v.* – – – 1

I.

Ingram, Union Bank of London *v.* – – – – 463
Izard, *Ex parte.* *In re* Moir – 703

J.

Jacob, Warner *v.* – – – 220
Jarmain *v.* Chatterton – – 493

[PAGE

Johnson, *In re.* Golden *v.* Gillam – – – – – 389

K.

Kennedy, Lyell *v.* – – – 484
Kingswood Collieries Company, Little *v.* – – – – 733
Kirksmeaton (Rector of), *Ex parte. In re* Hull Railway and Dock Act – – – 203

L.

Lawes, *In re.* Lawes *v.* Lawes 81
——— *v.* Lawes. *In re* Lawes 81
Leslie, *Ex parte. In re* Guerrier 131
Lewis, Ricketts *v.* – – – 745
Little *v.* Kingswood Collieries Company – – – – 733
London and South Western Railway Company *v.* Gomm – 562
Luxon, *Ex parte. In re* Pidsley 701
Lyell *v.* Kennedy – – – 484

M.

M'George, *Ex parte. In re* Stevens 697
McLean, Bidder *v.* – – – 512
Maggi, *In re.* Winehouse *v.* Winehouse – – – 545
Martin, *In re.* Hunt *v.* Chambers 365
May *v.* Thomson – – – 705
Midland Railway Company *v.* Haunchwood Brick and Tile Company – – – – 552
———————, Hobbs *v.* 418
Mitford, Nicholls *v.* – – 380
Moir, *In re. Ex parte* Izard – 703
Morley *v.* Clifford – – – 753

N.

Nicholls *v.* Mitford – – – 380

O.

Ottaway, *In re. Ex parte* Child 126
Ovey, *In re.* Broadbent *v.* Barrow – – – – – 676

P.

PAGE

Padstow Total Loss and Collision Assurance Association, *In re* – – – – – 137
Parnell, *In re. Ex parte* Ball – 670
Paul *v.* Paul – – – – 742
Peacock, Biggs *v.* – – – 200
Pidsley, *In re. Ex parte* Luxon 701
Pitt, *Ex parte. In re* Gosling – 308
Pogose, *In re. Ex parte* Vanderlinden – – – – 289
Pooley, *In re. Ex parte* Harper 685
Preston, Williams *v.* – – 672

Q.

Quartz Hill Consolidated Gold Mining Company *v.* Beall – 501

R.

Redgrave *v.* Hurd – – – 1
Reynolds, *Ex parte. In re* Reynolds – – – – – 294
Rhodes, Collins *v. In re* Baker 230
——— *v.* Wish. *In re* Seaman 230
Ricketts *v.* Lewis – – – 745
Rosenthal, *Ex parte. In re* Dickinson – – – – – 315
Ryder (H. D.), *In re* – – 514

S.

St. Giles, Camberwell (Vestry of), Stannard *v.* – – – 190
Sanders' Case. *In re* Albion Life Life Assurance Society – 403
Scottish Widows' Fund *v.* Craig 208
Seaman, *In re.* Rhodes *v.* Wish 230
Shardlow *v.* Cotterell – – 90
Sheffield, Curtis *v.* – – – 398
Smith *v.* Chadwick – – – 27
———, Teevan *v.* – – – 724
Smith's (Henry) Charity (Hartlepool), *In re* – – – 516
Solomon, *Ex parte. In re* Tilley 281
Sotheran *v.* Dening – – 99
Sparrow, *In re* – – – 320

PAGE

Stannard *v.* St. Giles, Camberwell (Vestry of) – – 190
Stevens, *In re. Ex parte* M'George 697

T.

Tadman *v.* D'Epineuil. *In re* Count D'Epineuil (1) – – 217
——— *In re* Count D'Epineuil (2) – – 758
Talbot, *In re* – – – – 269
Tanqueray-Willaume and Landau, *In re* – – – – 465
Tate, *In re* – – – – 135
Teevan *v.* Smith – – – 724
Tenison, Harston *v. In re* Cross 109
Thomson, May *v.* – – – 705
Tilley, *In re. Ex parte* Solomon – – – – – 281
Truscott *v.* Diamond Rock Boring Company – – – – 251
Turner *v.* Hancock – – – 303

U.

Union Bank of London *v.* Ingram 463
Upton *v.* Brown – – – 731

V.

PAGE

Vanderlinden, *Ex parte. In re* Pogose – – – – 289
Vesey, Cooper *v. In re* Cooper 611
Vron Colliery Company, *In re* – 442

W.

Ward, *Ex parte. In re* Ward – 356
Warner *v.* Jacob – – – 220
Watson *v.* Holliday – – 780
Weld, *In re* – – – – 451
Wetley Brick and Pottery Company, General Share and Trust Company *v.* – 130, 260
White, Carter *v.* – – – 225
Whitnell, *Ex parte. In re* Whitnell – – – – – 438
Wilkinson *v.* Hull, &c., Railway and Dock Company – – 323
Williams *v.* Preston – – 672
——— *v.* Williams – – 659
Winehouse *v.* Winehouse. *In re* Maggi – – – – 545
Wish, Rhodes *v. In re* Seaman 230

Y.

Yorke *v.* Brewer – – – 669

CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

BANKRUPTCY AND LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

REDGRAVE *v.* HURD.

C. A.
1881
FRY, J.
March 14, 15.
C. A.
Nov. 25, 26, 28

[1880 R. 0703.]

Misrepresentation—Specific Performance—Rescinding Contract—Damages.

The Plaintiff, a solicitor, published in the *Law Times* an advertisement headed "Law Partnership," stating that the advertiser, an elderly solicitor of moderate practice, with extensive connections, shortly retiring, and having no successor, would first take as partner an efficient lawyer who would not object to purchase the advertiser's suburban residence, value £1600. The Defendant answered the advertisement, and had an interview with the Plaintiff, at which the latter stated that his business brought in about £300 a year. The Defendant wrote saying that he should like to have some idea of the amount of business done for the last three years, and asking an interview for the purpose. At this interview the Plaintiff produced three summaries shewing a business of not quite £200 a year. The Defendant asked how the difference was made up, and the Plaintiff shewed him a number of papers which he said related to other business not included in the summaries. These papers, which the Defendant did not examine, shewed only a most trifling amount of business, and the gross returns of the business were in fact only about £200 a year. The Defendant shortly afterwards signed an agreement to purchase the house for £1600, and paid a deposit, the Plaintiff refusing to have any reference to the business inserted in the agreement. The Defendant took possession, but finding, as he alleged, that the business was worthless, refused to complete. The Plaintiff brought his action for specific performance. The Defendant put in a defence, in which he disputed the right to specific performance on the ground of misrepresentations as to the business, and by counter-claim claimed on the same ground to have the contract rescinded, and to have damages on the ground of the expenses he had been put to and the loss incurred by giving up his own

C. A.

1881

REDGRAVE v. HURD.

practice. He did not in his counter-claim specifically state what representations had been made, nor allege that they were false to the Plaintiff's knowledge:—

Held, by *Fry*, J., that the Defendant having had opportunity afforded him of ascertaining the truth of the representations made to him as to the amount of the business, and having to some extent, though carelessly and inefficiently, inquired into it, must be taken not to have relied on the representations, and that the Plaintiff was entitled to specific performance.

Held, on appeal, that where one person induces another to enter into an agreement with him by a material representation which is untrue, it is no defence to an action to rescind the contract that the person to whom the representation was made had the means of discovering, and might, with reasonable diligence, have discovered, that it was untrue:

Held, further, that it is no defence in such an action that the Defendant made a cursory and incomplete inquiry into the facts, for that if a material representation is made to him he must be taken to have entered into the contract on the faith of it, and in order to take away his right to have the contract rescinded if it is untrue, it must be shewn either that he had knowledge of facts which shewed it to be untrue, or that he stated in terms, or shewed clearly by his conduct, that he did not rely on the representation:

Held, therefore, that the Defendant was entitled to have the contract rescinded and the deposit returned, but that as he had not pleaded knowledge on the part of the Plaintiff that the statements as to the business were untrue, and had not specifically alleged the statements in his counter-claim, he could not recover damages.

Attwood v. *Small* (1) considered and explained.

IN January, 1880, the Plaintiff, a solicitor of *Birmingham*, inserted in the *Law Times* the following advertisement:—

"Law Partnership.—An elderly solicitor of moderate practice, with extensive connections in a very populous town in a midland county, contemplates shortly retiring, and having no successor would first take as partner an efficient lawyer and advocate about forty, who would not object to purchase advertiser's suburban residence, suitable for a family, value £1600, three-fourths of which might remain on security—no premium for business and introduction. A large field is here open for an efficient man, and great advantages for free education of sons. Address *R. J.*, No. 1919, 10 *Wellington Street, Strand*."

The Defendant applied by letter to the address indicated, and a correspondence ensued, the negotiation proceeding on the footing that the Plaintiff should receive the Defendant as his partner and

(1) 6 Cl. & F. 232.

transfer to him a moiety of his practice and the Plaintiff's leasehold house for £1600. On the 12th of February the Plaintiff and Defendant had two interviews, at the latter of which the Defendant's wife was present. There was a direct conflict of evidence as to what passed at these interviews, the Plaintiff asserting that he stated the business to bring him in about £200 a year, the Defendant and his wife saying that the Plaintiff stated it to bring in from £300 to £400 a year. The parties were examined orally in Court, and Mr. Justice *Fry* held that greater weight was to be attributed to the evidence of the Defendant and his wife than to that of the Plaintiff, and held that the Plaintiff had either represented his business as bringing in about £300 a year, or from £300 to £400 a year.

On the 14th of February the Defendant wrote to the Plaintiff: "Of course I should duly rely on your promise to do all you could to extend the business among your friends. Still I should be glad to have some idea as to the amount of business done at your office in the past three years and the nature of the nucleus with which we should start. Would you, therefore, be able to give me an hour next Tuesday to go into this matter and settle the terms of partnership?"

On Tuesday, the 17th of February, the parties accordingly had an interview at the Plaintiff's office. The Plaintiff produced to the Defendant three summaries of business done in 1877, 1878, 1879. These summaries shewed gross receipts not quite amounting to £200 in a year. The Defendant asked how the difference was made up, and the Plaintiff shewed him a quantity of letters and papers which he stated to relate to other business which he had done. No books of account were produced, the Plaintiff not having kept any books which shewed the amount of his business, but the Plaintiff shewed the Defendant some letter-books and diaries and a day-book. The Defendant did not examine any of the books, letters, and papers thus produced, but only looked cursorily at them, and ultimately agreed to purchase the house and take a share in the business for £1600. Mr. Justice *Fry* came to the conclusion that if the letters and papers to which the Plaintiff referred had been examined they would only have shewn business to the amount of £5 or £6 a year. The Defendant wished

C. A. 1881 REDGRAVE v. HURD.

the written agreement to set out that the £1600 was the consideration for the purchase both of the house and the share in the practice, but the Plaintiff refused to assent to this, and an agreement was drawn up and signed on the 2nd of March, 1880, by which the Defendant agreed to purchase the house for £1600, the practice not being referred to. The Defendant paid a deposit of £100, and on the 17th of April, 1880, was let into possession of the house, and removed thither with his family from *Stroud;* but finding, as he alleged, that the practice was utterly worthless, he gave up possession, and refused to complete the purchase. The Plaintiff, in June, 1880, commenced an action for specific performance of the written agreement to purchase the house.

The Defendant by his statement of defence admitted the signature of the agreement, but alleged that it was not binding on him for the reasons thereinafter mentioned. He then (par. 2) stated the advertisement, and alleged (par. 3) that the Defendant entered into correspondence with the Plaintiff with reference to it, and that it was arranged between them that the Plaintiff should receive the Defendant as his partner, and transfer to him a moiety of a moderate law practice which the Plaintiff stated that he possessed, together with the leasehold house, the Defendant agreeing to pay as consideration for the transfer both of the share in the practice and of the house the sum of £1600; (par. 4) that the Defendant requested the Plaintiff that the facts stated in par. 3 should be set out in the written agreement between the parties in order that it might appear that the payment by the Defendant of the £1600 was a consideration for the transfer of the leasehold house and the share in the law practice, but that the Plaintiff refused, "and the Defendant, for reasons appearing in the next paragraph, now alleges that in such refusal the Plaintiff was actuated by a fraudulent intention." (5) "Shortly after the partnership between the Plaintiff and the Defendant had been entered into in pursuance of the agreement thereto, the Defendant discovered that the said law practice was utterly worthless, and that the representations made in regard thereto by the Plaintiff were false; and the Defendant says that the Plaintiff made such false representations for the purpose of inducing him, the Defendant, to enter into the contract for the purchase of the said partner-

ship." The Defendant then proceeded to allege that certain misrepresentations had been made to him about the house. He then proceeded: "By way of counter-claim the Defendant relies upon the facts stated in his defence as though they were again repeated, and claims" to have the contract rescinded and the deposit of £100 returned to him, £100 damages for the Defendant's loss and trouble in removing from *Stroud* to *Birmingham*, £200 damages for having given up his practice at *Stroud*, and for further relief.

The Plaintiff by his reply submitted that the agreement for purchase was binding on the Defendant wholly irrespective of any arrangement in reference to the partnership; and that even if that were not so the Plaintiff had always been ready to carry out the agreement for a partnership, and that the allegations as to fraud and misrepresentation were untrue. He denied that the £1600, or any part thereof, was a consideration for the transfer of the share in the law practice. He admitted that he refused to enter into an agreement by which the £1600 should be in part a consideration for the purchase of a share in the law practice, and declined to sell the house for anything less than £1600, but said that it was wholly untrue that in such refusal he was actuated by any fraudulent intention. He denied having made any false representations as to his business.

The action came on for hearing before Mr. Justice *Fry* on the 14th of March, 1881.

North, Q.C., and *Yate Lee*, for the Plaintiff:—

The defence is that the contract was induced by misrepresentation. The misrepresentations relied upon ought to be specifically stated in the pleadings: *Cargill* v. *Bower* (1); *Arkwright* v. *Newbold* (2); *New Brunswick and Canada Railway and Land Company* v. *Conybeare* (3); *Western Bank of Scotland* v. *Addie* (4); *Mowatt* v. *Blake* (5). The *Judicature Act* has made no difference in this respect.

[FRY, J.:—I do not think the *Judicature Act* affects such a ques-

(1) 10 Ch. D. 502.
(2) 17 Ch. D. 301.
(3) 9 H. L. C. 711.
(4) Law Rep. 1 H. L., Sc. 145.
(5) 31 L. T. 387.

C. A. 1881 — REDGRAVE v. HURD.

tion as this, because it is only fair play between man and man that the Plaintiff should know what is charged against him.]

Cookson, Q.C., and *Ruegg*, for the Defendant :—

If necessary, leave to amend should be given. There has been no surprise, for the representations on which the Defendant relies have been stated in his answers to the Plaintiff's interrogatories: *Hall* v. *Maltby* (1). We wish to introduce an allegation that the Plaintiff represented that the law practice was worth £300 a year, and that this was untrue; and that he represented that the house was built of the best materials, and that he had been offered £1500 for it, and that this was untrue.

[*North* said that he would not oppose the amendment.]

The law practice was the decoy duck. The Defendant's object in removing was to get the business, and the Plaintiff knew this: *Lamare* v. *Dixon* (2); *Myers* v. *Watson* (3).

North, in reply, on the claim :—

No misrepresentation was made on which the Defendant had a right to act, or on which he did act, even if the contract for the purchase of the house and the contract for the purchase of the business are to be looked at together. But they were entirely distinct contracts.

Cookson, in reply, on the counter-claim :—

Misrepresentations were made on material matters. They were fraudulent, and they induced the contract. There is sufficient ground at any rate for refusing specific performance of the contract: *Cadman* v. *Horner* (4).

FRY, J., after stating the nature of the contract and the Defendant's allegations of misrepresentations made by the Plaintiff, expressed his opinion on the evidence that a representation as to the water supply of the house was not proved to have been false, and that the Defendant's case as to representations made by the

(1) 6 Price, 240.
(2) Law Rep. 6 H. L. 414.
(3) 1 Sim. (N.S.) 523.
(4) 18 Ves. 10.

Plaintiff about the value of the house had also failed. His Lordship proceeded :—

I then come to the third and last allegation, which has really created in my mind the only question in this litigation, that is, that the Plaintiff, in personal interviews with the Defendant, repeatedly stated to him that his law practice brought him in about £300 a year, and that he had a very extensive connection. That is stated in the original advertisement which led to the negotiations between the parties, and it appears to me clear that "connection" used in that sense is contrasted with practice, because the representation made by the advertisement was that the Plaintiff was "an elderly solicitor of moderate practice with extensive connections." According to the evidence of the Plaintiff, although his practice was very moderate, his connection in and about *Birmingham* was large, and, therefore, although he had not many actual clients, he had, as he represented, many potential clients.

Did the Plaintiff then represent that his practice brought him in about £300 a year? On that question there has been a great conflict of evidence. I am bound to say that I attribute greater weight to the statements of the Defendant and his wife than I do to the statement of the Plaintiff in that particular, and I think that I must treat it as proved that such a statement was made on two occasions by the Plaintiff to the Defendant.

The next inquiry is, was that statement true? In my judgment it clearly was not true. I do not believe that the Plaintiff's business brought him in anything like £300 a year, and in fact the Plaintiff when he was in the box did not say that it did.

But then there comes, in the second place, this very material inquiry: Did the Defendant purchase the house and go on with the negotiations upon the footing and upon the faith of that representation so made by the Plaintiff? I have come to the conclusion that he did not. I think that the Defendant's letter of the 14th of February is worthy of all the weight which has been attributed to it by the Plaintiff's counsel. The Defendant in that letter says in effect this: "While relying on your effort to extend the business among your connection, I feel I should like

C. A. 1881 REDGRAVE v. HURD. Fry, J.

to have some idea as to the amount of business done at your office in the past three years, and the nature of the nucleus with which we should start."

Accordingly the Defendant does, by the Plaintiff's invitation, visit him on the 17th of February and, then and there, there are produced to the Defendant by the Plaintiff the papers which relate respectively to the years 1877, 1878, and 1879, which have been called sometimes bills of costs and sometimes estimates, and they shew, roughly speaking, a gross amount of business done to the extent of about £200 a year. Then the common case of the Plaintiff and the Defendant is that, in answer to an inquiry by the Defendant, the Plaintiff said that there was other business which was not entered in those papers. I cannot attribute much weight to that other business, and for this reason, that, in my judgment, if the Defendant had meant to rely upon this extraneous business, which was not mentioned in the papers, he would have made some inquiry about it. The conclusion to which I come to upon the evidence is, that the books were there before the Defendant, and that, although he did not take the trouble to look into them, he had the opportunity of doing so. In my judgment, if he had intended to rely upon that parol representation of business beyond what appeared in the papers, having the materials before him, he would have made some inquiry into it. But he did nothing of the sort. I think the true result of the evidence is this, that the Defendant thought that, if he could have even such a nucleus of business as those papers disclosed, he could, by the energy and skill which he possessed, make himself a good business in *Birmingham*, and that he was willing to take as the business of the Plaintiff that which was represented in those papers.

There is no allegation that those papers are false, and in my judgment they are not false. Substantially I think they did truly represent the business done, and I think that there was some little, but very little, business beyond what was there represented; perhaps £5 or £6 a year would cover the additional business.

The Defendant went down for the purpose, as he says, of gaining an idea as to the amount of business done in the office, and ascertaining the nature of the nucleus upon which they would

start. He had the means of inquiring into it further than he did. He inquired into it to a certain extent, and if he did that carelessly and inefficiently, it is his own fault. As in *Attwood* v. *Small* (1), those directors and agents of the company, who made ineffectual inquiry into the business which was to be sold to the company, were nevertheless held by their investigation to have bound the company, so here I think that the Defendant, who made a cursory investigation into the position of things on the 17th of February, must be taken to have accepted the statements which were in those papers.

It is very noteworthy that I can find no reference to any distinct reliance by the Defendant on £300 a year at any time from the 17th of February, 1880, down to the answer to interrogatories which was filed in this action on the 2nd of September, 1880, a period of more than six months. A letter which was written on the 5th of May by the Defendant's solicitor no doubt contains vague and general statements of misrepresentation. But, if the Defendant had at that time believed in his own mind that he had entered into this bargain upon the footing of a representation that the business would bring him in £300 a year, knowing what he knew on the 5th of May, it is, to my mind, incredible that he would not have said something of the sort. I think there was a floating and vague notion that representations had been made by the Plaintiff to the Defendant, and that the Defendant really would have had a difficulty in saying in what respect he had been deceived (except in respect of the water supply) on the 5th of May.

I am bound to say that, in my judgment, great care is required in the investigation of these matters, that the Court should not be led astray by thinking that representations have been relied upon when they have not. Persons who enter into contracts ought to bear in mind that they are entering into important engagements, and that solemn contracts are not lightly to be set aside on the ground of vague representations which really do not operate on the mind of the contracting party.

I hold, therefore, that the Defendant has failed in his defence and in his counter-claim. I pronounce judgment for the Plaintiff

(1) 6 Cl. & F. 232.

C. A. 1881

REDGRAVE v. HURD.

for the specific performance of this contract, with costs, and I dismiss the counter-claim with costs.

W. L. C.

C. A.

The Defendant appealed. The appeal came on to be heard on the 25th of November, 1881.

Cookson, Q.C., and *Ruegg*, for the Appellant:—

Mr. Justice *Fry* came to the conclusion that the Plaintiff made untrue representations as to his business, but came to the conclusion that the Defendant did not rely on them. His Lordship referred to *Attwood* v. *Small* (1), but in that case there was a real investigation on which the Plaintiffs relied; here there was substantially no investigation: the Defendant took the Plaintiff's word that the papers shewn him on the 17th of February did make up the amount of business he had represented. A man does not lose his right to rescind for false representation on the mere ground that he had materials which would have enabled him to discover the truth if he had investigated them: *Rawlins* v. *Wickham* (2). Even a slight amount of misrepresentation will bar the right to specific performance: *Cadman* v. *Horner* (3). The onus lies on a person who has made false representations to shew clearly that they were not acted on: *Nicol's Case* (4). The agreement to purchase the house cannot be considered apart from the representations as to the business: *Lamare* v. *Dixon* (5); and, in fact, the purchase of the house was a mere accessory to the acquisition of a share in the business. The Defendant, therefore, is entitled to be relieved from the contract. The Defendant is on the counter-claim entitled to damages.

[LUSH, L.J.:—You do not state in your pleadings that the Plaintiff knew his representations as to the business to be untrue.]

[JESSEL, M.R.:—If you mean to charge a man with having wilfully made a false statement, you must tell him so. The

(1) 6 Cl. & F. 232.
(2) 3 De G. & J. 304.
(3) 18 Ves. 10.
(4) 3 De G. & J. 387, 439.
(5) Law Rep. 6 H. L. 414.

Plaintiff had no complete books, and he may have made his statements from memory without knowing that they were untrue.]

Rigby, Q.C., and *Yate Lee*, *contrà*:—

We say that the share in the business was no part of the consideration for the purchase of the house. The Plaintiff said, in substance, I will not bargain with you for the business, it is not worth bargaining about. The sale of the house was the substance of the transaction.

[BAGGALLAY, L.J.:—Do you construe the advertisement as meaning that?]

Yes.

[JESSEL, M.R.:—I do not so read it. Does not the advertisement mean this: I will make over my business to the person who will buy my house? The buying the house is to be the consideration for a share in the business.]

Then as to representations about the business, the letter of the 14th of February could not have been written by a person who had been told that the business brought in £300 or £400 a year.

[JESSEL, M.R.:—I do not see any inconsistency: and if you wish to contradict the Defendant's evidence by his own letter, you were bound to put it into his hands and ask him to explain it.

LUSH, L.J.:—That is certainly the rule.]

The Plaintiff throughout refused to let the partnership be part of the bargain. We claim the benefit of the finding of Mr. Justice *Fry* as a matter of fact that the Defendant did not rely on any representations as to the business. The rule laid down in *Kerr* on Fraud (1) is the rule which we ask the Court to apply here. Under the circumstances, it is not to be inferred that any representation as to the business induced the Defendant to enter into the bargain.

[LUSH, L.J.:—How do you shew that the Defendant ceased to rely on the representations that had been made to him?]

The letter of the 14th of February shews it. The Defendant

(1) Pages 31, 32.

C. A. 1881

REDGRAVE v. HURD.

did not rely on the amount of actual business, but on the belief that the Plaintiff could give him a good introduction.

JESSEL, M.R. :—

This is an appeal from a decision of Mr. Justice *Fry*, granting specific performance of a contract by the Defendant to buy a house from the Plaintiff, and dismissing with costs a counter-claim by the Defendant asking to rescind the contract, and also asking for damages on the ground of deceit practised by the Plaintiff in respect to the agreement.

As regards the Defendant's counter-claim, we consider that it fails so far as damages are concerned, because he has not pleaded knowledge on the part of the Plaintiff that the allegations made by the Plaintiff were untrue, nor has he pleaded the allegations themselves in sufficient detail to found an action for deceit. It only remains to consider the claim of the Plaintiff for specific performance, and so much of the counter-claim of the Defendant as asks to have the contract rescinded.

Before going into the details of the case I wish to say something about my view of the law applicable to it, because in the text-books, and even in some observations of noble Lords in the House of Lords, there are remarks which I think, according to the course of modern decisions, are not well founded, and do not accurately state the law. As regards the rescission of a contract, there was no doubt a difference between the rules of Courts of Equity and the rules of Courts of Common Law—a difference which of course has now disappeared by the operation of the *Judicature Act*, which makes the rules of equity prevail. According to the decisions of Courts of Equity it was not necessary, in order to set aside a contract obtained by material false representation, to prove that the party who obtained it knew at the time when the representation was made that it was false. It was put in two ways, either of which was sufficient. One way of putting the case was, "A man is not to be allowed to get a benefit from a statement which he now admits to be false. He is not to be allowed to say, for the purpose of civil jurisdiction, that when he made it he did not know it to be false; he ought to have found that out before he made it." The other way of putting it was this: "Even assuming that moral

fraud must be shewn in order to set aside a contract, you have it where a man, having obtained a beneficial contract by a statement which he now knows to be false, insists upon keeping that contract. To do so is a moral delinquency: no man ought to seek to take advantage of his own false statements." The rule in equity was settled, and it does not matter on which of the two grounds it was rested. As regards the rule of Common Law there is no doubt it was not quite so wide. There were, indeed, cases in which, even at Common Law, a contract could be rescinded for misrepresentation, although it could not be shewn that the person making it knew the representation to be false. They are variously stated, but I think, according to the later decisions, the statement must have been made recklessly and without care, whether it was true or false, and not with the belief that it was true. But, as I have said, the doctrine in equity was settled beyond controversy, and it is enough to refer to the judgment of Lord *Cairns* in the *Reese River Silver Mining Company* v. *Smith* (1), in which he lays it down in the way which I have stated.

There is another proposition of law of very great importance which I think it is necessary for me to state, because, with great deference to the very learned Judge from whom this appeal comes, I think it is not quite accurately stated in his judgment. If a man is induced to enter into a contract by a false representation it is not a sufficient answer to him to say, "If you had used due diligence you would have found out that the statement was untrue. You had the means afforded you of discovering its falsity, and did not choose to avail yourself of them." I take it to be a settled doctrine of equity, not only as regards specific performance but also as regards rescission, that this is not an answer unless there is such delay as constitutes a defence under the *Statute of Limitations*. That, of course, is quite a different thing. Under the statute delay deprives a man of his right to rescind on the ground of fraud, and the only question to be considered is from what time the delay is to be reckoned. It had been decided, and the rule was adopted by the statute, that the delay counts from the time when by due diligence the fraud might have been discovered. Nothing can be plainer, I take it, on the authorities

(1) Law Rep. 4 H. L. 64.

C. A. 1881 REDGRAVE v. HURD. Jessel, M.R.

in equity than that the effect of false representation is not got rid of on the ground that the person to whom it was made has been guilty of negligence. One of the most familiar instances in modern times is where men issue a prospectus in which they make false statements of the contracts made before the formation of a company, and then say that the contracts themselves may be inspected at the offices of the solicitors. It has always been held that those who accepted those false statements as true were not deprived of their remedy merely because they neglected to go and look at the contracts. Another instance with which we are familiar is where a vendor makes a false statement as to the contents of a lease, as, for instance, that it contains no covenant preventing the carrying on of the trade which the purchaser is known by the vendor to be desirous of carrying on upon the property. Although the lease itself might be produced at the sale, or might have been open to the inspection of the purchaser long previously to the sale, it has been repeatedly held that the vendor cannot be allowed to say, "You were not entitled to give credit to my statement." It is not sufficient, therefore, to say that the purchaser had the opportunity of investigating the real state of the case, but did not avail himself of that opportunity. It has been apparently supposed by the learned Judge in the Court below that the case of *Attwood* v. *Small* (1) conflicts with that proposition. He says this: "He inquired into it to a certain extent, and if he did that carelessly and inefficiently it is his own fault. As in *Attwood* v. *Small*, those directors and agents of the company who made ineffectual inquiry into the business which was to be sold to the company were nevertheless held by their investigation to have bound the company, so here, I think, the Defendant who made a cursory investigation into the position of things on the 17th of February must be taken to have accepted the statements which were in those papers." I think that those remarks are inaccurate in law, and are not borne out by the case to which the learned Judge referred. Of course where you have five Lords giving independent reasons, it is very difficult to ascertain with accuracy the ground upon which the House of Lords decided, but I think that in all such cases you must only look at the judgments of the

(1) 6 Cl. & F. 232.

majority who decided the case, for the reasons to be found in their judgments must be either wholly or to some extent the reasons which guided the House of Lords in coming to their conclusion. I therefore confine myself for this purpose to the opinions of the three Lords who decided the case in favour of the Appellants. The first opinion is that of Earl *Devon*, who had been a Master in Chancery, and although of course his opinion is entitled to great respect, yet I do not attach so much importance to it as I do to that of Lord *Cottenham*. His Lordship says (1): "The question is not as to waiver or acquiescence in fraud, but whether the parties have used that ordinary degree of vigilance and circumspection in order to protect themselves which the law has a right to expect from those who apply for its aid." In that sentence I think he is not quite correct as regards the law, but the ground of his judgment is this: "The whole course of the proceeding from its commencement to its close tends to shew that the purchasers did not rely upon any statements made to them, but resolved to examine and judge for themselves." Now, that is a good ground if borne out by the evidence. It is a different ground from that taken by the other Lords, but it cannot be objected to in point of law.

I now turn to the judgment of Lord Chancellor *Cottenham*, who says (2), "We are now trying two propositions by this evidence, first, whether fraud was practised; and, secondly, whether that which is alleged as fraud, or rather the facts from which fraud is inferred, were not known to the Plaintiffs, or to those by whose conduct and by whose knowledge they must be affected from the very commencement of this transaction. I have satisfied myself that both these propositions are in favour of the Defendant;" that is, he found not only no fraud, but he also found that all the material facts were known before they entered into the contract. "I do not find the fact of fraud made out, although undoubtedly it may be supposed that the bargain was a very good one for Mr. *Attwood*. That is not the matter in question, but that the fraud alleged, which alone can be resorted to for the purpose of supporting the Plaintiff's case, is not made out in fact, and that the circumstances from which that fraud is endeavoured to be inferred

(1) 6 Cl. & F. 344. (2) 6 Cl. & F. 393.

C. A. 1881 REDGRAVE v. HURD. Jessel, M.R.

by the Plaintiffs, are, in my opinion, proved to have been known to them from the beginning." Those are the two grounds of his judgment, and neither of them is anything like the proposition to be found in the judgment of Mr. Justice *Fry*, that if cursory or ineffectual attempts are made by the agents of the person defrauded to discover the real facts he loses his right to complain of the fraud. There is a sentence in Earl *Devon's* judgment to that effect, but not in Lord *Cottenham's*.

The only other judgment which was in favour of the appeal was a very long judgment of Lord *Brougham*, which I shall not read through, but at p. 497 we find his conclusion: "My Lords, when we apply to this case the principles which I stated at the outset, we find the facts are wanting; we find there is no misrepresentation which gave rise to the contract" (that is, he concurs with Lord *Cottenham* that there is no fraud—that is the first ground). "We find that the purchasers did not rely upon the representation, but said, We will inquire ourselves"—that is the second ground; it is the same as Lord *Devon's* ground, and also would be a good answer, though it was not taken by Lord *Cottenham*. Then he goes on: "From the 6th of June, 1825, downwards, they constantly proceeded upon the plan of satisfying themselves, first by sending their agents, then by going down themselves, then by inquiring themselves, then even afterwards by sending other agents to inquire, and those agents reporting that the representation was true, and that those parties finding by their own inquiries" (not as Mr. Justice *Fry* puts it, "the imperfect inquiries of agents") "that the agents had reported accurately, and that the representation was corroborated by the result of the inquiry, and that even when their own interest, when everything in the commercial world was down, when shares were falling, when money was not to be had, when they were asking time for a prolongation of the term of payment to Mr. *Attwood*, and when it was their interest to discover a flaw in the contract, they then inquire again and send a new agent to inquire, Mr. *Foster*, an engineer, and they state to him their own opinion to be in favour of Mr. *Attwood's* representations; and Mr. *Foster*, in answer as late as the 26th of April, less than a month before the bill was put upon the file, reports in favour of Mr. *Attwood's* representa-

tions. Such being the facts, even if no observation arose as to the delay, as to the adoption and affirmance of the contract, purging it of all objections which might be made, and supposing that they had come in time, instead of delaying so many months; then I ask myself this question, In these circumstances have these parties a right to be released from their contract by the interposition of a Court of Equity, according to those principles which I have stated? When I ask myself that question upon which alone my judgment must turn, I am bound to say No." So that the two grounds taken by Lord *Brougham* are that there was no misrepresentation, and that the purchasers did not rely on the representations. He agreed in one with Lord *Cottenham* and in the other with Lord *Devon*. The three grounds taken by the three noble Lords, one of which grounds was taken by one only of the Lords, and each of the others by two, were that there was no fraud—that there was actual knowledge of the facts before the contract, and that no reliance was placed upon the representation. In no way, as it appears to me, does the decision, or any of the grounds of decision, in *Attwood* v. *Small* (1), support the proposition that it is a good defence to an action for rescission of a contract on the ground of fraud that the man who comes to set aside the contract inquired to a certain extent, but did it carelessly and inefficiently, and would, if he had used reasonable diligence, have discovered the fraud.

As regards the facts of this case, I agree with the conclusions of Mr. Justice *Fry* on every point but one, and my failure to agree with him in that one is the cause of my concurring in reversing his decision. What he finds in effect is that the Defendant *Hurd* was induced to enter into the contract by a material misrepresentation made to him by the Plaintiff *Redgrave*, but he comes to the conclusion that either he did not finally rely upon that representation, or that if he did rely upon it he made an inquiry which, although ineffectual and made, as he says, carelessly and inefficiently, bound him in a Court of Equity, and prevented him from saying that he relied on the representation. I have already dealt with that as a matter of law, and I will deal with it presently as a matter of fact, because I think there was an

(1) 6 Cl. & F. 232.

C. A. 1881 REDGRAVE v. HURD. Jessel, M.R

omission to notice a most material fact, or rather, I should say, an omission to give sufficient weight to it, for it is noticed in the judgment which is now appealed from.

Now the facts to my mind are clear, and I am glad to say, with one exception, they are in writing. The Plaintiff *Redgrave* advertised in the *Law Times* for a law partnership. The *Law Times* is not a publication in which people ordinarily advertise for the sale of a house, but is one in which they do advertise for partners in law partnerships. [His Lordship then read the advertisement.] That means this: "There is a moderate practice, I shall not take a premium for it if you will take my house off my hands;" that is, the purchase of the house is the consideration for giving him the partnership in the moderate business. A man issuing such an advertisement cannot be heard to say that he had no business worth mentioning to sell. I agree that his main object was to get rid of the house, and that he had little else to dispose of. It appears on his own evidence that his gross business was £200 a year, what its nett value was I am unable to say, but I should think £100 a year a very high estimate of its nett value. He says by the advertisement that he is elderly and has no successor, which implies that there is a succession to something of some value. He says it is "a moderate practice with extensive connection," which is not a truthful description of a practice such as I have mentioned, a practice which would give £50 a year nett to each of the two partners. We start then with an advertisement containing a misrepresentation, and as far as I can see, of facts within the advertiser's own knowledge, for he does not pretend to say that he did not know that his business had a gross value of only £200 a year; on the contrary, he says in his evidence that he told the Defendant so.

Interviews then took place. The first interview was on the 12th of February. There is a conflict of evidence as to what passed at that interview, and the learned Judge below gave credit to the evidence of *Hurd* and his wife that *Redgrave* stated his practice to be between £300 and £400 a year. Having regard to the advertisement, it is most probable that he did make some such statement, for he had made representations in the advertisement which were inconsistent with its amounting only to £200

a year. But I do not rely on that. The rule of the Court of Appeal is that when there is direct conflicting oral testimony, and the Judge who has seen the witnesses believes one party and disbelieves the other, this Court, not having seen the witnesses, cannot disturb that decision any more than it could disturb the verdict of a jury under similar circumstances. We must, therefore, take it as a fact that *Redgrave* represented to *Hurd* on the 12th of February that his business was worth about £300 a year, or between £300 and £400 a year, it does not matter which.

Another interview took place between the Plaintiff and the Defendant on the 17th of February. Before proceeding to what is said by the learned Judge as to what took place on the 17th of February, I will refer to the observations which he made just before. "Then comes, in the second place, this very material inquiry. Did the Defendant purchase the house and go on with the negotiations upon the footing and upon the faith of that representation so made by the Plaintiff" (that is, the representation made on the 12th of February)? "I have come to the conclusion that he did not. I think that the letter of the 14th of February is worthy of all the weight which has been attributed to it by the Plaintiff's counsel. The Defendant in that letter says this: 'While relying on your effort to extend the business among your connection, I feel I should like to have some idea of the amount of business done at your office during the past three years, and the nature of the nucleus with which we should start.'" Now to my mind that means this: "You have told me you are making between £300 and £400 a year, but I should like to know what is the average of the past three years. What you are making for one year is not sufficient for me." Therefore, the Defendant does not rely exclusively on the statement of the £300 a year because he wants further information, but he does not give up the reliance on the statement. "Accepting your statement that you are making £300 a year, tell me what you made during the last three years." That that is the true meaning of the letter is, I think, shewn by the nature of the documents produced on the 17th of February to the Defendant by the Plaintiff: "The Defendant does, by the Plaintiff's invitation, visit him on the 17th of February, and then and there are produced to the Defendant

C. A.
1881
REDGRAVE
v.
HURD.
Jessel, M.R.

by the Plaintiff the papers which relate respectively to the years 1877, 1878, and 1879, which have sometimes been called bills of costs, and sometimes called estimates, and they shew, roughly speaking, a gross amount of business done to the extent of about £200 a year. Then the common case of the Plaintiff and the Defendant is that in answer to an inquiry from the Defendant, the Plaintiff said there was other business which was not entered upon those papers." Now that inquiry as I understand it was this, "You were doing £300 a year, you shew in those papers only £200 a year, where is the rest?" And the answer was, "Oh, there is a lot of papers here containing business which will account for the rest." Well, it appears to me, that that being the common case of both parties, it shews that *Hurd*, though still relying on the representation that the business was at least £300 a year, when he found that the papers shewed only a gross £200 a year, wanted to know where the business was that made up the £300 a year, and he is told, "Oh there are a lot of papers there; I have not made out my bills of costs fully, but you will find the business if you look through those papers;" but he did not look through them. The learned Judge continues: "I cannot attribute much weight to that other business, and for this reason, that in my judgment if the Defendant had meant to rely upon this extraneous business, which was not mentioned in the papers, he would have made some inquiry about it." I am sorry to say I differ from every word of that. The Defendant did make an inquiry. All that the Plaintiff had prepared for him were these summaries. He says, "Where is the rest of the business?" "Oh it is in that parcel of papers." How could the Defendant make out bills of costs from the parcel of papers? he could do nothing but rely on the Plaintiff's statement that the parcel of papers did contain the business. Then the learned Judge goes on to say: "According to the conclusion which I come to upon the evidence, the books were there before the Defendant, and although he did not trouble to look into them he had the opportunity of doing so. In my judgment if he had intended to rely upon that parol representation of business beyond that which appeared in the papers, having the materials before him, he would have made some inquiry into it. But he did nothing

of the sort." Now in that respect I am sorry to say that the learned Judge was not correct. There were no books which shewed the business done. The Plaintiff did not keep any such books, and had nothing but his diaries, and some letter books; and therefore, it is a mistake to suppose that there were any books before the Defendant which he could look into to ascertain the correctness of the statements made by the Plaintiff; and the whole foundation of the judgment on this part of the case, even if it had been well founded in law, fails in fact, because the Defendant was not guilty of negligence in not doing that which it was impossible to do, no books being in existence which would shew the amount of business done. Then the learned Judge continues: "He did nothing of the sort: I think the true result of the evidence is this, that the Defendant thought that if he could have even such a nucleus of business as these papers disclosed, he could by the energy and skill which he possessed make himself a good business in *Birmingham*." Then that being so the learned Judge came to the conclusion either that the Defendant did not rely on the statement, or that if he did rely upon it he had shewn such negligence as to deprive him of his title to relief from this Court. As I have already said, the latter proposition is in my opinion not founded in law, and the former part is not founded in fact; I think also it is not founded in law, for when a person makes a material representation to another to induce him to enter into a contract, and the other enters into that contract, it is not sufficient to say that the party to whom the representation is made does not prove that he entered into the contract, relying upon the representation. If it is a material representation calculated to induce him to enter into the contract, it is an inference of law that he was induced by the representation to enter into it, and in order to take away his title to be relieved from the contract on the ground that the representation was untrue, it must be shewn either that he had knowledge of the facts contrary to the representation, or that he stated in terms, or shewed clearly by his conduct, that he did not rely on the representation. If you tell a man, "You may enter into partnership with me, my business is bringing in between £300 and £400 a year," the man who makes that representation must know that it is a material induce-

C. A. 1881 REDGRAVE v. HURD. Jessel, M.R.

ment to the other to enter into the partnership, and you cannot investigate as to whether it was more or less probable that the inducement would operate on the mind of the party to whom the representation was made. Where you have neither evidence that he knew facts to shew that the statement was untrue, or that he said or did anything to shew that he did not actually rely upon the statement, the inference remains that he did so rely, and the statement being a material statement, its being untrue is a sufficient ground for rescinding the contract. For these reasons I am of opinion that the judgment of the learned Judge must be reversed and the appeal allowed.

As regards the form of the judgment, as the appellant succeeds on the counter-claim, I think it would be safer to make an order both in the action and the counter-claim, rescinding the contract and ordering the deposit to be returned. As I have already said, it is not a case in which damages should be given.

BAGGALLAY, L.J.:—

Upon the hearing of this action, Mr. Justice *Fry* held, as a conclusion of fact, from the evidence before him, that a misrepresentation was made by the Plaintiff to the Defendant as to the amount of his professional business. The learned Judge had the opportunity of hearing and seeing the witnesses, and of observing the manner in which their evidence was given, and it must be a very strong case indeed in which the Court of Appeal, upon a question of fact, entirely depending upon oral testimony, will dissent from the finding of the Court below. Mr. Justice *Fry* also held that the Defendant ought not to be considered as having been influenced by those misrepresentations to enter into the contract, but I am unable to concur in this conclusion. The facts from which that conclusion was drawn were partly proved by oral testimony and partly by written documents. As regards the oral testimony, according to the judgment of Mr. Justice *Fry*, it amounted to this, that opportunities were afforded to the Defendant to ascertain the inaccuracy of the representation made to him, and that to some extent, at least, he had availed himself of those opportunities. The mere fact that a party has the opportunity of investigating and ascertaining whether a representation

is true or false is not sufficient to deprive him of his right to rely on a misrepresentation as a defence to an action for specific performance. The person who has made the misrepresentation cannot be heard to say to the party to whom he has made that representation, "You chose to believe me when you might have doubted me, and gone further." The representation once made relieves the party from an investigation, even if the opportunity is afforded. I do not mean to say that there may not be certain circumstances of suspicion, which might put a person upon inquiry, and make it his duty to inquire, but under ordinary circumstances, the mere fact that he does not avail himself of the opportunity of testing the accuracy of the representation made to him will not enable the opposing party to succeed on that ground. The case of *Rawlins* v. *Wickham* (1) is a very strong illustration of the application of that principle. There, a person who had been induced by false representations to enter into a partnership continued in that partnership for four years, and then for the first time discovered the fraud which had been practised upon him. He was held entitled to relief, though at any time during that period he might have investigated matters for himself. It is true that in the present case there was some investigation, but it was an investigation of a most cursory character, which could not have enabled the Defendant to ascertain the truth or the falsity of the representation that had been made. So far, therefore, as the conclusions arrived at by the learned Judge, upon consideration of the oral testimony on that second point are concerned, I am unable to agree with him.

As regards the written testimony, it is all one way: very different considerations apply to a case in which the testimony before the Judge in the Court below is written from those which apply where it is oral, for the Judges of the Court of Appeal have as good an opportunity of judging of the value of written evidence as the Judge before whom the case is originally brought. I need not enter into any of the details of the circumstances, as they have been treated of by the Master of the Rolls. The advertisement clearly was addressed to solicitors, and suggested that there was a favourable opening for such a person. And the correspon-

(1) 3 De G. & J. 304.

C. A. 1881 REDGRAVE v. HURD. Baggallay, L.J.

dence which passed between the Defendant and the Plaintiff informed the Plaintiff that the Defendant was a gentleman, who was seeking to establish himself in the business of a solicitor in some place to obtain a sufficient business to bring up his family, and particularly, amongst other things, with a view of introducing one of his own sons into the profession. The Plaintiff must have known from this, that the advantages suggested by him in connection with the business which he was about to surrender supplied an influential motive to the Defendant in entering into the contract. It is quite true that the contract actually signed was limited to the purchase of the house, but it is impossible to say that the Defendant was not mainly induced to enter into that contract by the prospect of establishing himself in a remunerative business. On these grounds, I think that the decision of the Court below ought to be reversed.

LUSH, L.J.:—

I entirely agree with my learned Brothers as to the propositions of law applicable to this case which have been laid down by the Master of the Rolls, and as they have been so clearly and pointedly expressed I do not think it at all necessary to repeat them, because I have not myself the least qualification to suggest as to those propositions. And so far they differ from one part of the judgment of the learned Judge in the Court below, in which he appears to hold that where a false representation has been made and papers are handed to the party to whom it is made, from which if he chose he might detect the falsehood, and he does not do so, he is in the same position as if he had done so. I entirely differ from that view, and think what my learned Brother said was the correct view of the law, that where a false representation has been made it lies on the party who makes it, if he wishes to escape its effect in avoiding the contract, to shew that, although he made the false representation the Defendant, the other party, did not rely upon it. The *onus probandi* is on him to shew that the other party waived it, and relied on his own knowledge. Nothing of that kind appears here. On the question of fact, I regret to say, that I cannot follow the learned Judge of the Court below, in the inference he draws from the facts which were before him. After

stating his view of the law, that a party who has the opportunity of looking into the documents is put in the same position as if he had looked into them, the learned Judge goes back to the question of fact. "I think," he says, "the true result of the evidence is this, that the Defendant thought that if he could have even such a nucleus of business as those papers disclosed, he could, by the energy and skill which he possessed, make himself a good business in *Birmingham*, and that he was willing to take as the business of the Plaintiff that which was represented on those papers." Now, it is clear, that the business represented in those papers was a business not exceeding £200 a year in any one of the three years to which those papers referred; therefore the learned Judge finds as a matter of fact that the Defendant, although the representation had been made, that the business yielded from £300 to £400 a year, was content to buy a business bringing in only £200 a year. Though the learned Judge lays down the proposition of law to which I have referred, he does not decide the case on that ground, but on the inference of fact that, although the representation had been made, the Defendant relied on the future potential business which the Plaintiff held out, gave up all reliance on that representation, and was content to take the business, though only bringing in £200 a year, as one which would suit him. Now I do not find any evidence whatever which justifies that conclusion. The learned Judge goes through the facts shortly, and, after balancing the evidence *pro* and *con.*, considers whether such a representation was originally made that the business yielded £300 a year, and comes to the conclusion that it was, and by that we are bound. [His Lordship then referred at length to the passages from the judgment of *Fry*, J., which had been commented on by the Master of the Rolls.]

The learned Judge goes on to say that it was the common ground of both parties that, in answer to the inquiry from the Defendant, the Plaintiff said that there was other business which was not entered upon those papers, and the Plaintiff himself says in his answers to his interrogatories, speaking of that interview: "I produced the said papers to the Defendant, and stated to him, as the fact was, that the items of business mentioned therein did not represent all the business done for the years 1877, 1878, and

C. A. 1881 REDGRAVE v. HURD. Lush, L.J.

1879, but that I had done other items of business which I had not entered in the said bills." So far in my judgment from that sanctioning the idea that the Defendant had agreed to accept what appeared in those papers as representing the amount of business done, it is an actual affirmance by the Plaintiff of his original representation as to the business being £300 a year or between £300 and £400. That being so, I entirely differ from the conclusion which the learned Judge has drawn from those pieces of evidence. On another point, the learned Judge held what I think was perfectly right, that the contract for the house and for the purchase of the business was one entire contract, the one being the inducement to the other, and that the principal subject of that contract between the parties was the partnership which was to end in the sale of the business. The purchase of the house, although the value of the house was much larger than that of the goodwill of the business, was only an accessory to the acquisition of the business, for the Defendant did not want the house near *Birmingham* unless he had a business at *Birmingham*. The misrepresentation as to the business therefore entitles the Defendant to be discharged from his contract for the purchase of the house; but I agree, for the reasons stated by the Master of the Rolls, that he is not entitled to damages.

Solicitor for Plaintiff: *John Holder.*
Solicitor for Defendant: *R. Biale.*

H. C. J.

SMITH *v.* CHADWICK.

[1876. S. 166.]

C. A.
1881
FRY, J.
Nov. 23, 24, 25, 26, 28, 29.
C. A.
1882
March 13, 14, 17.

Action for Deceit—Promoters of Company—Misrepresentation in Prospectus—Ambiguous Representations—Contemporaneous Documents.

In an action for deceit, if it is proved that the Plaintiff did not rely upon the false statement complained of, he cannot maintain the action.

If the name of a person is improperly placed on the list of directors in the prospectus of a company, it must depend upon the circumstances of the case whether it is a material misstatement.

If a statement, by which the plaintiff says he has been deceived, is ambiguous, the plaintiff is bound to state the meaning which he attached to it, and cannot leave the Court to put a meaning upon it.

The prospectus of a company stated that the present value of the turnover or output of the entire works was more than a million sterling per annum. The Plaintiff complained that that was untrue, but declined to state the meaning which he attached to the words "turnover or output," except that he understood them in their ordinary meaning:—

Held, that the expression was ambiguous, and that as the Plaintiff did not state in what sense he understood it, he could not rely upon the misstatement as a ground of action.

If a statement, although untrue to the knowledge of the Defendants, is so trivial that it could not in the opinion of the Court have influenced the conduct of the Plaintiff, it will not support an action for deceit.

A misstatement of the valuation of the property of a company to the amount of £3000 out of £301,000 *held* not to be a material misstatement.

The prospectus of an iron working company stated that the purchase-money for the works was to be paid by instalments, the amount of which was mentioned, but it did not state, according to the fact, that interest was to be paid on the instalments:—

Held, that the omission of mention of the interest was not a material misstatement.

The Defendants sent to the Plaintiff the prospectus of a company, for whom they acted as agents, on the faith of which the Plaintiff took shares in the company. A few days afterwards the Defendants sent the Plaintiff a circular containing other statements concerning the company, but the Plaintiff did not receive it till after he had taken the shares:—

Held, that the circular could not be taken as a contemporaneous document with the prospectus, and could not be read for the purpose of explaining it.

The judgment of *Fry*, J., reversed.

THIS was an action brought by *William Smith*, a steel manufacturer at *Sheffield*, against Messrs. *Chadwick*, accountants, carrying on business in *London* and *Sheffield*, for damages alleged to

C. A. 1882 SMITH v. CHADWICK.

have been sustained by the Plaintiff by his having been induced to take shares in the *Blochairn Iron Company* (*Limited*), by the fraudulent misrepresentations of the Defendants.

The company was formed in the early part of the year 1873, for the purpose of purchasing from Messrs. *Hannay & Sons* the *Blochairn Ironworks* near *Glasgow*, and also the *Nether Johnstone Colliery*, which Messrs. *Hannay* were under contract to purchase.

The alleged misrepresentations were contained in a prospectus dated the 27th of May, 1873, signed by the Defendants, and a circular letter from them bearing the same date, which accompanied it.

The prospectus contained the names of the directors, among whom appeared the name of *James J. Grieve*, Esq., M.P. for *Greenock*. It stated, among other things, that the company was formed for the purchase of the ironworks of Messrs. *Hannay & Sons* at *Blochairn*, and their collieries at *Nether Johnstone;*

That the whole of the properties had been valued under the Defendants' instruction, and the total value, exclusive of stocks and stores, amounted to £301,000;

That the stocks and working capital might be estimated at about £200,000;

That the purchase-money was to be payable to Messrs. *Hannay* as follows:—£100,000 in 2000 fully paid-up shares of £50 each, and the remainder in cash in four instalments, namely, one-fourth on taking possession of the property, one-fourth in six months, one-fourth in twelve months, and the balance in eighteen months;

That in making the valuation there had been no addition for goodwill;

That the ironworks were the largest and most important in *Scotland*, and had been equipped in a substantial, complete, and permanent manner; and that they would then produce at the rate of 1500 tons of finished bars and plates per week, or about 75,000 tons per annum;

That the rolling mills with some slight alterations would be capable of turning out 90,000 tons of manufactured iron per annum;

That the present value of the turnover or output of the entire works was over £1,000,000 sterling per annum;

That the land on which the works stood was about 17 acres and was held in perpetuity, subject only to a very reasonable ground rent or feu duty.

The contract between Messrs. *Hannay* and one of the Defendants, who was a trustee for the company, was referred to: and it was stated that copies might be seen at the Defendants' offices in *Glasgow* and *London*.

In the circular letter which accompanied this prospectus the Defendants said, "We have much confidence in recommending this investment to our friends: and request to be favoured with your early application" (1).

On the 4th of June the Plaintiff sent in an application for a hundred £50 shares in the company on the faith, as he alleged, of the statement in the prospectus. These shares were afterwards allotted to him, and he eventually paid the whole amount due on them, namely, £5000.

On the 25th of July, 1874, the company being unsuccessful, a resolution was passed for winding it up voluntarily.

On the 5th of May, 1876, the Plaintiff brought the present action against Messrs. *Chadwick*, claiming £5750 as damages sustained by him by having been induced to take shares in the company by the fraudulent misrepresentations of the Defendants.

The misrepresentations alleged in the statement of claim were principally as follows:—

That Mr. *Grieve* was untruly stated to be a director of the company;

That the prospectus in stating the mode in which the instalments on the purchase-money were to be paid, did not mention that interest at £5 per cent. was to be paid on the instalments, and that the company was to give bills for the principal and interest of such instalments;

That the statement that in making the valuation there had been no addition for goodwill led the Plaintiff to suppose that the goodwill was valuable, whereas it was quite worthless;

That the statement that the ironworks were equipped in a substantial and complete manner, and that they could then produce at

(1) This letter is stated at length in the judgment of the Master of the Rolls.

C. A. 1882 — SMITH v. CHADWICK.

the rate of 1500 tons of finished bars and plates per week, was not true;

That the statement that the present value of the turnover or output of the entire works was £1,000,000 per annum was not true;

That the valuation made of the land comprised twenty acres, whereas only seventeen acres were included in the purchase by the company. The circumstances under which this was done are fully stated in the judgments of Mr. Justice Fry and the Master of the Rolls.

The Plaintiff also complained that he had been misled by the statements in a publication called "*Chadwick's* Investment Circular," drawn up by one of the Defendants, a copy of which was sent to the Plaintiff on the 3rd of June. In that circular it was stated that the works had been purchased at a valuation based on their actual capacity and profits over a series of years, whereas the Plaintiff alleged that no profits, but on the contrary, large losses had been made for several years past; and it was further stated that the annual turnover was £1,000,000. It appeared however that this circular was not actually received by the Plaintiff till after he had sent in his application for the shares.

With respect to the statements in the prospectus, the following facts were established by the evidence. Mr. *Grieve* had originally given his consent to be a director: and on the 24th of May, 1873, while the prospectus was in preparation, the Defendants wrote to him asking him to sign the memorandum and articles of association which were sent to *Scotland* for the other directors to sign: but Mr. *Grieve* telegraphed in reply on the 26th of May, "Your movements are too rapid for me; cannot conclude finally till I hear from Mr. *Morton* to-morrow regarding necessary inquiries." The Defendants, however, expecting that the answer of Mr. *Morton*, who was himself a director, would be satisfactory, issued the prospectus without striking out Mr. *Grieve's* name. The Plaintiff also admitted in his cross-examination that he had never heard of Mr. *Grieve* before, and only knew his name from seeing it in the prospectus; and when asked if his name had any effect in inducing him to join the company, he shook his head.

The estimate of the quantity of finished bars and plates which

the works were capable of turning out was based on the valuations of Mr. *Hulse* and Mr. *Armstrong*, surveyors, who certified that the works were constructed and equipped in a substantial, complete, and permanent manner, and in full operation could produce 1500 tons of finished bars and plates per week, or about 75,000 tons per annum. The estimate of the turnover or output was as calculated on the same power of production, at the then current price of iron.

With respect to the paragraph in the prospectus respecting the turnover or output, a question arose as to the true meaning of the words used, and the Plaintiff in his answers to interrogatories as to the meaning which he put upon the misrepresentations alleged in the statement of claim said, "I understand the meaning of such misrepresentations to be that which the words composing them obviously convey, and I am unable to express in any other words what I understood to be the meaning thereof."

The Plaintiff and Defendants and several witnesses were examined at the trial. The action came on for hearing before Mr. Justice *Fry* on the 23rd of November, 1881.

Glasse, Q.C., and *Cozens-Hardy*, appeared for the Plaintiff.

J. Pearson, Q.C., and *Russell Roberts*, for the Defendants, referred to *Hallows* v. *Fernie* (1); *Venezuela Railway Company* v. *Kisch* (2); *Eaglesfield* v. *Marquis of Londonderry* (3); *Arkwright* v. *Newbold* (4).

Glasse, in reply, referred to *Peek* v. *Gurney* (5).

FRY, J.:—

The Plaintiff sues the Defendants, who are members of a firm of financial agents carrying on business in *Manchester* and *London*, in respect of an alleged deceit contained in a prospectus and certain other papers to which I shall refer, and, as the facts relating to the issue of these papers have been to some extent in controversy, it is necessary for me to state briefly the facts as I find

(1) Law Rep. 3 Eq. 520.
(2) Ibid. 2 H. L. 99.
(3) 4 Ch. D. 693.
(4) 17 Ch. D. 301.
(5) Law Rep. 6 H. L. 377.

C. A. 1882 SMITH v. CHADWICK. Fry, J.

them with regard to these matters. [After stating the negotiations which led to the formation of the company, and the effect of the valuations made by Mr. *Hulse* and Mr. *Armstrong*, and the nature of an agreement of the 21st of May, 1873, between Messrs. *Hannay* and Mr. *Adamson*, his Lordship continued:—] On the 26th or 27th of May a prospectus was issued by Messrs. *Chadwick & Co.*, and was posted on one of those days (it is quite immaterial which) to the Plaintiff, accompanied by a letter dated the 27th of May, which I only refer to at the present moment in order to say that in it they address the Plaintiff as one of their "friends," a designation which undoubtedly was intended to imply that they had placed themselves in the position of friends towards him, and were therefore to some extent interested in the concern on his behalf. They undertook to perform the duties of a friend towards him. That prospectus I shall have to refer to more minutely hereafter.

The next material fact is this, that at some date before the 4th of June the Plaintiff received another copy of the same prospectus, together with a letter of the 31st of May, strongly urging upon him the taking of shares in the company.

On the 4th of June the Plaintiff applied for shares, and sent with his application a remittance for the amount which was payable on application. That money was received by Messrs. *Chadwick*, acting for the intended company or for the vendors, as the case might be, on the 5th of June. It appears to me also that another document was received by the Plaintiff on the 5th of June, I mean the circular of the 3rd of June. The evidence of the printers has satisfied me that although that document is dated the 3rd of June, it could not have been posted before the 4th of June, and as the Plaintiff applied for shares on the 4th of June, I cannot come to the conclusion that that document was received by him before his application was made.

The company was registered on the 19th of June, and on the 21st of June the allotment of shares was made.

In the year 1874, the following year, the company proved to be entirely unsuccessful, and was wound up, and in the same year I believe Messrs. *Hannay* became bankrupt. The failure of the company, as well as that of Messrs. *Hannay*, appears, from the

evidence before me, to be attributable to the rapid fall which then took place in the value of iron. Messrs. *Hannay* had largely speculated in pig iron, and the company's prospects of success depended on the price of iron.

These are the facts as I find them on the evidence, and they appear to me to be all the facts which are material to state on this part of the case, adding only that the whole amount of the Plaintiff's subscription has been called up, and that he has received nothing in the shape of profit by way of dividend or otherwise.

I must now inquire whether this circular, which was issued on the 26th or 27th of May to the Plaintiff, does or does not contain statements which are false and fraudulent, whether there are in it material misrepresentations of fact. I entirely agree with the observation which has been made that the prospectus must be read as a whole. I have endeavoured so to read it, but of course, in criticising it, I can only take it passage by passage. I cannot express my judgment on the whole at once.

The first point, taking the prospectus in the order in which it stands, which is raised by the Plaintiff as an objection to it is this, that amongst the directors of the company there is named Mr. *James J. Grieve*, M.P. for *Greenock*, and the Plaintiff says that when that prospectus was issued Mr. *Grieve* had not agreed to become a director. There is a conflict between the evidence of Mr. *Grieve* and Mr. *Chadwick* as to the date at which Mr. *Grieve* had (unwillingly, as he says) acceded to the request of Mr. *Chadwick* that he would become a director of the company. Mr. *Grieve* is positive that his consent was given late in the evening of Friday the 30th of May. Mr. *Chadwick* is equally positive that it was given late in the evening of Friday the 23rd of May. I think Mr. *Chadwick* is right on that point, and that Mr. *Grieve* is in error. But, assuming Mr. *Chadwick* to be right, it nevertheless remains clear that on the 26th of May, and before any copies of the prospectus had been sent out, Mr. *Grieve* had sent a telegram to Messrs. *Chadwick* by which he entirely withdrew from his connection with the company. Nothing can be plainer than Messrs. *Chadwick's* letter of the 26th of May, in which they describe the incident in these words: "We were thrown into a sudden consternation this afternoon by the receipt of the follow-

C. A. 1882 SMITH v. CHADWICK. Fry, J.

ing telegram from Mr. *Grieve* at the House of Commons: 'Your movements are too rapid for me, cannot conclude finally until I hear from Mr. *Morton* regarding necessary inquiries.'" I observe in passing that Mr. *Grieve* had insisted on a knowledge of the past success of the firm, that to that object his inquiries had been directed, and that down to this period he had received no satisfaction on that point. "When this arrived," the letter continues, "we had already printed a large number of the prospectuses, and we have decided to send them out, notwithstanding this telegram, as Mr. *Morton's* replies cannot fail to be satisfactory, he having consented himself to join the board." It appears to me that there was no reason to suppose that Mr. *Morton's* reply would be satisfactory. I am bound to say that, in my judgment, it was a most unscrupulous and improper proceeding on the part of the Defendants, with the knowledge that Mr. *Grieve* declined to be a director until those inquiries had been answered, to publish his name to the world as a director of the company. I think that this statement, therefore, was false in fact, and that it was false to the knowledge of the Defendants. How far it operated on the mind of the Plaintiff is a question to which I will presently refer. It is said that the Defendants were justified in doing this, because they were anticipating that Mr. *Grieve* would consent. But, with the knowledge that they possessed of Mr. *Grieve's* insistence upon some information as to past success, and that they had no such information to give him—because on inquiry they had been refused any information of the kind—I think they had very little reason to expect that Mr. *Grieve* would ever alter his mind and consent to become a director.

The next statement with which fault is found occurs very soon after the commencement of the body of the prospectus. The prospectus begins thus: "The company is formed for the purchase of the well-known ironworks of Messrs. *Hannay & Sons*, situated at *Blochairn*, near *Glasgow*, and their collieries at *Nether Johnstone*, near *Motherwell*. The whole of the properties have been valued under our own instructions; the ironworks by Mr. *W. W. Hulse*, of *Manchester*, and the collieries by Mr. *William Armstrong*, of *Chester-le-Street*, and the total value, exclusive of stocks and stores, amounts to £301,000." That statement is perfectly unquestionable.

Then, after a reference to the valuation to be made by Mr. *Hulse* of the stocks and stores, the statement proceeds: "The purchase-money is payable to the vendors as follows:—£100,000 in 2000 fully paid-up shares of the company, and the remainder in cash in four instalments, viz., one-fourth on taking possession of the property, one-fourth in six months, one-fourth in twelve months, and the balance in eighteen months." It is obvious from that that the prospectus proceeds on this suggestion, that the company are buying the property at the valuations of Messrs. *Hulse* and *Armstrong*, and it is to be borne in mind that, in a latter part of the prospectus, it is stated that the land on which the works are situated comprises about seventeen acres, held subject to very reasonable annual ground rents. The Plaintiff says that that is a representation that the seventeen acres of land had been valued by Mr. *Hulse* in such a manner that, taken together with the other properties of the company, it amounted together to £301,000. In my judgment that is distinctly the representation made by the prospectus, and in my judgment that is distinctly untrue, because three acres of land were excepted from the property comprised in the contract of the 31st of May, except to the extent of one moiety of the balance which might afterwards be found payable. I think the importance of that is not lessened by the statement which is contained in the prospectus, that a railway was then being constructed which would pass through the company's premises, and have convenient sidings in connection with it. Without saying that that was intended to represent that the railway company would have to pay in the handsome way in which such companies usually have to pay for land which they take, it is obvious that there is a representation that the whole of Mr. *Hulse's* valuation is included in the sale. That, therefore, makes a difference of £13,000 in the value of the property.

Another point arises on the passage which I have already read. The purchase-money is stated to be £301,000, of which £201,000 is payable at the dates and in the proportions and instalments I have already mentioned. There is not one syllable there said about interest, either on the instalments or on the shares. The interest on the instalments is stated by both parties to be some-

C. A. 1882 SMITH v. CHADWICK. Fry, J.

thing over £10,000. The contention of the Defendants is, that any man of business, any man of ordinary knowledge of the world, reading that statement, and observing that the payment is to be made by instalments, would infer that interest is payable on those instalments, I suppose from the time of the taking possession by the company. It may be my ignorance or my stupidity, but I certainly should not so read it, and for this reason, that, as far as I am aware, wherever else a statement is made with regard to the payment of money which involves the payment of interest as well as principal, you find it stated as a matter of course. You might be surprised that interest was not payable on the instalments, but that would be mere matter of convention between the company and the vendors. No doubt the misrepresentation here relied upon is one of non-statement, not strictly a mis-statement, but where silence implies something which is false, there undoubtedly silence may amount to misrepresentation. I will only refer on that point to the language of Lord *Cairns* in *Peek* v. *Gurney* (1), where he laid down the ingredients necessary to support an action of deceit. He says (2): "There must, in my opinion, be some active mis-statement of fact, or, at all events, such a partial and fragmentary statement of fact as that the withholding of that which is not stated makes that which is stated absolutely false." It appears to me that this statement comes exactly within that principle. To state that the principal is payable at a given date, and to say nothing about interest when interest is payable, is a partial withholding of facts, and such a withholding of that which is not stated as makes that which is stated absolutely false. The extent, therefore, to which the amount of the purchase-money of the property was misrepresented appears to me to have been between £20,000 and £30,000.

[His Lordship then referred to the statements in the prospectus that in making the valuation there had been no addition for goodwill and no premium; that the vendors would deposit £100,000 as a guarantee of the profits; and that the ironworks were the largest and most important in *Scotland* and could produce about 75,000 tons per annum, as to all of which statements he held that the Plaintiffs had no substantial ground of complaint.

(1) Law Rep. 6 H. L. 377. (2) Law Rep. 6 H. L. 403.

His Lordship continued:—] The next words of the prospectus are these, "The rolling mills, with some slight alterations, will be capable of turning out 90,000 tons of manufactured iron per annum. The present value of the turnover or output of the entire works is over one million sterling per annum." That is, in my judgment, one of the most material statements in the prospectus. Hitherto, it will be observed, the prospectus has been silent as regards past profits or past or present working, although it contains plain statements with regard to the capacity of the works. Here, according to my reading of the sentence, we have an actual statement relative to the present output, the present turnover, of the works. It appears from the evidence that in the year 1872 the actual money received from iron manufactured and sold was only £365,000, and that in the first five months of 1873 it was £194,000, at the rate therefore of less than half a million per annum. It appears also that, taking the works as they were then going on, the actual output was nothing like that. The justification which the Defendants allege for this statement is this, they say that the turnover or output there meant was not the then present output nor the past, but the output which might be effected according to the capacity of the works as estimated by Mr. *Hulse*. That is a simple question of construction and of the meaning of the English language. It appears to me that it would be a very remarkable construction to hold that the words "the present value of the turnover or output of the entire works" mean the present value of the turnover or output which the works are capable of producing, but never have produced; of the turnover or output which is expected or hoped for in the future. Whereas if "the present value of the turnover or output" means the output for a year at the rate at which it is now going on, it is quite intelligible and simple. You have then the present value of the present output, not the present value of a past output, or the present value of a future output. I so understood the words when I first read the prospectus, and I so understand them after having heard the able argument of the Defendants' counsel. I am remarkably confirmed in that conclusion by this circumstance, that on the 3rd of June one of the Defendants, who tells us that he was one of the joint authors of the prospectus, penned a circular

C. A. 1882 SMITH v. CHADWICK. Fry, J.

which was published on the 4th of June, in which it is evident that he had the prospectus before him, and that he paraphrased the sentence which I have just read in these words, "The total amount of the business or annual turnover of the concern is upwards of one million sterling per annum." It appears to me that that language is incapable of being misunderstood. It does not even speak of the present value, that is, the market value of the present business, but it tells you that the actual amount of the business, that is, the business then being done, is upwards of one million sterling per annum. I understand that to mean that the amount which was actually being received for the iron which you were actually then producing would, spread over a year, equal £1,000,000. I am using this statement in the circular, not as an independent statement of the Defendants, but only, as it appears to me to be, as a contemporaneous exposition of the meaning of the statement in the prospectus by the Defendants themselves. I will only add that, if this turnover or output was intended to refer to that which the works were capable of producing, it is very remarkable that the paragraph contains no reference to the preceding statement of capacity. It does not say "turnover or output computed as before-mentioned." It does not refer in any way to the preceding paragraph. It is a substantive and independent paragraph containing no reference to what has gone before, and it deals, as it seems to me, with the actual present, not the future prospective value.

It is admitted that that statement is not true if it refers to the then present output. The then present output was something like half a million, instead of one million. That statement, I am bound to say, appears to me to be one of the most material in the whole prospectus, because, as I read it, it contains a reference to the actual working of the concern. Mr. *Pearson* has urged that the actual and past working of the concern is of very little consequence compared with the prospective profits, and in one sense that is true, but for many purposes the past is the best guide for the future.

These, I believe, are all the points in the prospectus on which the Plaintiff relies as misrepresentations on the part of the Defendants. According to my judgment those misrepresentations are

made out to the extent which I have already stated. I ask whether these misrepresentations, viz., with regard to Mr. *Grieve*, with regard to the amount of the purchase-money, with regard to the actual turnover or output of the works, were material? Without attempting to say that they were each of them equally material, which I do not for a moment think they were, I think that, taken as a whole, they were material, and the last especially was above all others likely to influence the mind of a person in Mr. *Smith's* position, a man of business, accustomed to look at the actual profits, the actual output of a concern, as an important ingredient in considering the future.

I now pass on to the circular of the 3rd of June. That circular contains a statement to which I have already referred, and about which I will say no more. It contains also this statement, "Valuations based on the actual productive capacity and profits of these works over a series of years have been accepted by the vendors." Mr. *Hulse* in his examination told us in very emphatic language, that his valuation was in no way based either upon actual productive capacity, or upon past profits or results in any form. He proceeded on a totally different basis. He considered the actual value of the mine, and the actual value of the material —in fact, what it would sell for. So far, therefore, as that statement relates to Mr. *Hulse's* valuation, which was by far the most material of the two, his being the valuation of the ironworks, and Mr. *Armstrong's* only relating to the collieries which, although an important ingredient, formed only a subsidiary point in the concern, it is not true. It remains to inquire how far this statement was true with regard to Mr. *Armstrong's* valuation. His valuation appears to proceed, not upon past profits, although they are referred to in it, but upon the anticipation of future profits, and he arrived at that by calculating the amount of coal in the field, the length of lease, the cost of working, and the probable price at which the coal would be sold. It is said by the Defendants that this statement refers to future profits. I certainly should not so read it. I should certainly read it as meaning that the valuations were based on profits which had been received at the works or received by the sellers. Whether that be so or not, it is plainly not true to say that the valuations were based upon that. It was

C. A. 1882 SMITH v. CHADWICK. Fry, J.

plainly untrue so far as the most important of the two valuations was concerned. That statement seems to me to be one which it is not creditable to the Defendants to have made, bearing in mind that they had then reports before them, and Mr. *Hulse* had, according to his own evidence, called the attention of Mr. *Chadwick* to the fact, that his valuation was in no way based on results, and had therefore advised him to insist upon the guarantee which was ultimately given.

It remains to inquire whether this circular can be deemed to have influenced the Plaintiff's conduct. On that point matters stand in this way. According to my conclusion on the evidence, that circular was not received by the Plaintiff until after he had applied for his shares. It was received in the interval of time when he might have revoked his offer. But can it be said that a misrepresentation, the only effect of which is, that a man does not revoke an offer, is a misrepresentation creating a right to bring such an action as this? I hesitate to come to any such conclusion, and I am bound to say that I should have very considerable difficulty in inferring that the Plaintiff was influenced by this circular. He says that he read it, but, if he read it after he made up his mind to apply for shares, nothing is more probable than that he read it without its influencing him. He was not asked a single question as to the influence proved on his mind by it, and although, no doubt, in many cases, the Court is bound to infer that reliance has been placed on statements, yet in this case, being a judge of fact, and having seen Mr. *Smith* in the box, I have great difficulty in coming to the conclusion that he was really influenced by the circular. That being so, I shall leave out of consideration in the judgment which I am about to pronounce the influence which that circular might have had on the Plaintiff's mind.

The mis-statements in the prospectus remain, however, in my opinion unaffected by that part of the case, and they were, in my judgment, material. I think they led the Plaintiff into a contract under which he has had to pay £5000. Therefore, as I find all the ingredients which are necessary to maintain an action of deceit, I hold that the Plaintiff is entitled to damages equal in amount to the loss which he has sustained by taking the shares.

I desire to add this. It has been suggested that Mr. *Oldfield Chadwick* received information of the actual output from Messrs. *Hannay*. That does not appear to me to be in any way material. His statement with regard to the information received from them was of a very vague description, and it is plain that they throughout refused to give any exact information as to the result of their works. Further, I take it to be clear law, that if a man without accurate knowledge of a fact, will make a statement with regard to that fact in order to induce another to enter into a contract, the person who makes that statement is liable for the deception on this very simple ground, that whilst he does not know a thing, he states in effect that he does know it, and that is a false statement. The law upon this point is very clear, and I will only refer to the old case of *Pawson* v. *Watson* (1), where Lord *Mansfield*, referring to cases of life policies, says (2), "If there is no warranty, and he says, 'the man is in good health,' when in fact he knows him to be ill, it is false. So it is if he does not know whether he is well or ill, for it is equally false to undertake to say that which he knows nothing at all of, as to say that is true which he knows is not true."

On these grounds therefore, I think the Plaintiff is entitled to the damages which I have already mentioned, and to the costs of the action.

W. L. C.

From this judgment the Defendants appealed. C. A.

The appeal came on to be heard on the 13th of March, 1882.

J. Pearson, Q.C., Sir *Hardinge Giffard*, Q.C., and *Russell Roberts*, for the Defendants:—

None of the alleged mis-statements in the prospectus will support the Plaintiff's action. Some of them are not mis-statements at all, and such as are not strictly correct were made *bonâ fide* and are immaterial. The prospectus is perfectly fair, and is studiously framed so as not to deceive, and the Defendants had good ground for believing every statement to be correct.

(1) 2 Cowp. 785. (2) 2 Cowp. 788.

C. A. 1882 SMITH v. CHADWICK.

With respect to the insertion of Mr. *Grieve's* name as a director, the Defendants did not understand his telegram as an absolute refusal to become a director, and they fully believed that he would be one. But whether true or not the statement was immaterial, for the Plaintiff would not say in the witness box that his conduct was influenced by it.

The mistake in the valuation of the property by which three acres which had been sold to the railway company were included, is explained by the circumstances, and is really immaterial, the difference of value being only £3000 out of £301,000.

The omission of reference to interest being payable on the instalments is immaterial; no one could be misled by it. No one could suppose that the vendors would forego interest on the deferred instalments of their purchase-money.

The objection about the reference to the goodwill of the business is unfounded. There was in fact no goodwill. What was sold was the works, and their whole value lay in their productiveness.

The statement as to the value of the turnover or output is not false; and the Plaintiff's objection rests upon a misunderstanding of the expression. It does not mean that the value of the amount of iron actually produced in some past year had been £1,000,000, but that the works were capable of producing that amount. The statement was based upon Mr. *Hulse's* estimate, that they could turn out 75,000 tons of iron, and at the then price of iron that would amount to about £1,000,000. The Plaintiff wishes to fix the Defendants to his own interpretation of the expression, although he will not even pledge himself to the fact that he so understood it when he took the shares. To succeed in this suit he is bound both to shew that this was the meaning which he attached to the words, and that it is the sense in which the Defendants used them: *Hallows* v. *Fernie* (1); *Arkwright* v. *Newbold* (2).

With respect to the investment circular, whatever statements it may have contained, it has no bearing on the question; for the Plaintiff took the shares before he received it; he cannot, therefore, say that he was deceived by it.

(1) Law Rep. 3 Ch. 467. (2) 17 Ch. D. 301.

Glasse, Q.C., and *Cozens-Hardy*, Q.C., for the Plaintiff:—

It is not necessary for us to shew that the Defendants made the statements complained of knowing them to be false. If they had the means of knowing the facts, or if not having the means of knowing them they recklessly made them, they are liable in an action for deceit: *Western Bank of Scotland* v. *Addie* (1). The Defendants are financial agents and familiar with such matters as these, and they had investigated these particular works and must be supposed to pledge themselves to the accuracy of what they stated. The unwarranted insertion of Mr. *Grieve's* name as a director is a material mis-statement. Most persons in joining a company are influenced by the names of the directors, and there is no doubt that Mr. *Grieve's* name was improperly inserted in order to give weight to the company.

The concealment of the fact that interest was payable on the instalments was also a material mis-statement: *Peek* v. *Gurney* (2). The representation as to the turnover or output was also material. We have a right to take the statement in the ordinary and obvious meaning of the words. Whatever the exact meaning of "turnover" may be, it is clear that the present value of the output must refer, not to the capabilities of the works, but to what had actually been produced. And this is made clear from the expression used in the *Investment Circular*. It is true that the circular was not received till after the shares were applied for, but it was all part of one transaction, and as such may be read as a contemporaneous document with the prospectus. If we succeed only as to some of the mis-statements we are entitled to relief: *Venezuela Railway Company* v. *Kisch* (3).

JESSEL, M.R.:—

This is an appeal from a judgment of Mr. Justice *Fry* in a most important action. It is an action which used to be called an action of deceit. It is an action brought by a gentleman of the name of *William Smith*, who is a steel manufacturer, against a firm of accountants, or financial agents, as they are called, of *Chadwick & Co.*, for inducing him to take shares in an iron com-

(1) Law Rep. 1 H. L., Sc. 145. (2) Law Rep. 6 H. L. 377.
(3) Law Rep. 2 H. L. 99.

C. A. 1882 SMITH v. CHADWICK. Jessel, M.R.

pany by means of false and fraudulent misrepresentations, that is, by means of representations, which were material to induce him to take the shares, which were false in fact, false to the knowledge of the Defendants, or as to which at all events they made statements although they knew nothing about the facts—that is, statements made so recklessly as that in a Court of Law they would be in the same position as if the statements were false to their knowledge. That is the case which the Plaintiff has to make out.

Now, he has in his favour the judgment of Mr. Justice *Fry;* and the real questions which we have to try are, whether there were representations false in fact; whether if any of those representations were false in fact, they were false to the knowledge of the Defendants, or recklessly made by them; whether, if there were any such, they were material to induce the Plaintiff to enter into the contract.

Now, without repeating at full length what I have said in a recent case, I think the law on this subject is clear. A man may issue a prospectus, or make any other statement to induce another to enter into a contract, believing that his statement is true, and not intending to deceive; but he may through carelessness have made statements which are not true, and which he ought to have known were not true, and if he does so he is liable in an action for deceit; he cannot be allowed to escape merely because he had good intentions, and did not intend to defraud. Again, on the question of the materiality of the statement, if the Court sees on the face of it that it is of such a nature as would induce a person to enter into the contract, or would tend to induce him to do so, or that it would be a part of the inducement, to enter into the contract, the inference is, if he entered into the contract, that he acted on the inducement so held out, and you want no evidence that he did so act; but even then you may shew that in fact he did not so act in one of two ways, either by shewing that he knew the truth before he entered into the contract, and therefore, could not rely on the mis-statements; or else by shewing that he avowedly did not rely upon them, whether he knew the facts or not. He may by contract have bound himself not to rely upon them, that is to take the matter at his own risk

whether they were true or false (which was the conclusion to which the House of Lords came in the recent case of *Brownlie* v. *Campbell* (1), or he may state that he did not rely upon them in the witness-box, which I think is so in one instance here. But unless it is shewn in one way or the other that he did not rely on the statement the inference follows.

We now come to another class of cases, in which it is not obvious to the Court that the statement is material; and there may be several ways in which it may not be obvious. In the first place, the statement may be ambiguous; it may have one of two meanings, and the Court cannot decide which meaning it has. I believe this case will furnish an instance of that also; and in fact it may be so ambiguous that one Judge cannot find out which of two meanings it has, another Judge may take one meaning, and the third Judge may take the other meaning. In that case the Plaintiff must tell us what he relied on. It is for him to say, "I relied on the statement in this meaning, that is the meaning I took; if it is ambiguous it is the fault of the Defendant, and relying on that I entered into the contract." But if the Plaintiff will not tell us what he relied on; if he says to the Court, "Please to find out the meaning; I relied on the statements in the prospectus, and I relied upon them according to their meaning, whatever that meaning is"; surely that will not do. How can the Court find out that he has been deceived at all? The Court may think it means the very thing the Plaintiff did not think it meant, and then are they to say he has been deceived, because he took it in the wrong sense? That, of course, is impossible. That point of law, I think, will be found to have some application to the present case.

Again, in an action of deceit, even though the statement may be untrue, yet, if it was made in good faith, and the Defendant had reasonable ground for believing it to be true, the Defendant will succeed. That again, it will be seen, has an application to this case also.

Finally, it is not every mis-statement, although untrue, and although untrue, in a sense, to the Defendant's knowledge, that will do. It may be that the mis-statement is trivial—so trivial

(1) 5 App. Cas. 925.

C. A. 1882 SMITH v. CHADWICK. Jessel, M.R.

as that the Court will be of opinion that it could not have affected the Plaintiff's mind at all, or induced him to enter into the contract; or it may be that although the means of knowledge were in the hands of the Defendant, yet the matter was minute, and required a careful examination, and there may have been reasonable grounds for the Defendant to believe that this statement was true, although he had those means of knowledge in his possession. In that way also he would be entitled to succeed.

Having said so much about the general law, I will now come to the case we have to decide. The alleged misrepresentations are contained in a prospectus, and in an accompanying letter. The statements, I agree with Mr. Justice *Fry*, must be read as a whole. You do not dissect them minutely until you have arrived at some conclusion as to the entirety; and again, viewing the matter as an entirety, you must consider what the true relation of the parties was.

Now, I feel compelled to say that, having listened to the evidence, and read every material part of it, and having considered the arguments, and the judgment of the Court below, I have arrived at the conclusion that the Defendants were honest men; that they intended fairly to represent to their customers what the business was they had to sell, and the circumstances under which they intended to sell it; and that if the decision is to be given against them in this case, it must be, not on the ground of dishonesty, but on the ground of carelessness. That, in my opinion, has a material bearing in construing the documents, because, if you once arrive at the conviction that the persons who made the representation intended to act honestly, I think if you have any doubt or hesitation as to the meaning of the terms, the rule prevails that you presume things were done rightly.

In the next place, I think the two parties were at arm's length; I think that the Plaintiff thoroughly understood that Messrs. *Chadwick & Co.*, the Defendants, had an interest in the sale of the property in question, and that he dealt with them on that footing. And I think, speaking with great respect as I always do of anything which falls from Mr. Justice *Fry*, that he has come to a contrary conclusion under a total misapprehension of the real relation of the parties, a mistake so extraordinary that I feel bound to say

that I did not credit it when I first read it in the judgment; I thought there was some mistake in the shorthand notes; but there is not, and, on examination, the matter appears to be one so serious as to have affected his mind as regards the position and conduct of the Defendants. The letter which accompanied the circular was in these terms:—"May 27th, 1873.—Sir,—We beg your special and careful perusal of the accompanying prospectus of the *Blochairn Iron Company, Limited.* The vendors have agreed to sell on the fair and reasonable valuations made under our own instructions. The works are the largest of the kind in *Scotland;* nothing is paid for goodwill, and a substantial guarantee is given of 50 per cent. in five years, or 10 per cent. per annum on the paid-up capital. The future good management is secured by the appointment of directors and of a managing director of great experience. We have much confidence in recommending this investment to our friends, and request to be favoured with your early application." Now, that letter accompanied the prospectus: it was signed "*Chadwicks, Adamson, Collier & Co.,*" the name of the firm. What does it mean? It means, I think, that they were financial agents, known to be such, and they had taken it up. They are not the vendors—"the vendors have agreed to sell on the fair and reasonable valuations made under our own instructions"—"our own" as distinguished from "the vendors." What are they? They are financial agents. Evidently they are the agents of the vendors; they are bringing it out. They had in fact a commission; that is not apparent, but from the known position of these people, everybody must have understood it. They say "our friends." What does that mean? Everybody, I should have thought, acquainted with commerce knows that that is the civil way of describing your customers, or business connections. People acquainted with commercial literary language know there is nothing more civil in this world than the terms used by merchants and people engaged in business. They always call their customers "their friends," and they generally "have great pleasure in accepting or giving an order," and so on. How Mr. Justice *Fry* could have fallen into the mistake he has is certainly to me something very remarkable; but it colours the whole judgment, and having once taken up that position, of

C. A. 1882 SMITH v. CHADWICK. Jessel, M.R.

course, he said, instead of acting as friends towards him they were interested for themselves to earn their commission. Their real position was commission agents; they were to get a commission of one per cent. on the sale moneys, except on the fully paid-up shares, if they succeeded in floating the company; if not, they were to get nothing, at least only ten guineas, which is a mere nothing. It appears that the Plaintiff had had some experience in this matter; he is a steel manufacturer himself, and he had turned his own business into a limited company. He knew Messrs. *Chadwick* before, and he said as a rule they did not work for nothing, and, of course, he never suggested for a moment that they were acting as his "friends," or incurring any obligation towards him, or that they were not to be paid for their work.

But the matter does not stop there. The Plaintiff put in an answer to interrogatories, and there he states that he looked on Messrs. *Chadwick* as principals. I do not understand by that he considered they were the actual vendors, although that has been suggested to us by counsel; but he looked upon them as principals in the sense that they had a substantial interest in selling, and that is what he swore to in his answers to interrogatories. Therefore, he knew perfectly well that their position was that of persons who were recommending it to him with a view of getting some advantage to themselves,—some benefit; not an improper advantage, and that they were, as I said before, at arm's length.

That being so, I come to consider this: What does the Plaintiff tell us as to the effect of the representations on his mind? Here we have an answer to the interrogatories, and I must say it is not the answer I should have expected to get from a man who comes into Court and says, I have been deceived by false representations, and thereby induced to enter into a contract. I should expect him to say: "I was deceived by such and such false representations." But he will not say it. He is interrogated as to what he understood the thing to mean, and this is his answer. Having given a long string of alleged misrepresentations, he says: "As to each and every of the allegations of misrepresentations contained in the statement of claim, First, I understood the meaning of such misrepresentations respectively to

be that which the words composing them obviously convey, and I am unable to express in any other words what I understood to be the meaning thereof." Is a man to come into Court with such a statement as that? It means this, "You please to find out what the words mean, and that is how I understood them." I must say that I do not think that is dealing fairly with the Court, nor is it dealing fairly with the Defendants. I agree that if there are any obvious misstatements he is entitled to rely upon them, but he is not to tell us in this way, "I relied on a misrepresentation according to what the words obviously convey, and I will not tell you what that is; I am unable to express in any other words what I meant." So that we are dealing with a Plaintiff who says he has been deceived, but will not condescend to particulars, and will not tell us in what respect he was deceived.

Now, having said so much as far as the Plaintiff is concerned, I will consider the position of the Defendants. No doubt they had a very serious interest in the matter, because they were to get some thousands of pounds if they succeeded, but there is not a trace in the case of any fraud on their part, or of any indirect practices. I think they were unwise, and unwise in this respect, that when Messrs. *Hannay* would not shew them their books or tell them their profits, as they state to have been the case, they might have suspected that the business had been carried on at a loss, and might have refused to go on with the matter. But before proceeding to details, I think I ought to make one other observation. Not being able to get the profits, or to get the information, which I think they might have insisted upon, or said we will have nothing further to do with it, they issued the prospectus, which I think was fairly characterised by the counsel for the Appellants as one of the most colourless prospectuses that had ever been seen. There is not from beginning to end a statement that the business had been profitable, that any profits had been earned, or that it had been carried on successfully; nothing of the sort, and what is offered to be sold is merely the works, and nothing else. I must say if the prospectus had been shewn to me, I should have said at once, "There is nothing said about past profits; has the business been carried on successfully?" and I should have thought the Plaintiff, as a man of

C. A. 1882 SMITH v. CHADWICK. Jessel, M.R.

business, would have noticed that too. But it is remarkable for what I may call bareness and baldness, and remarkable because the sin of prospectuses is generally in the other direction. Now that prospectus contains several things, and I am not going to read it, because I shall have to read portions of it in speaking of what the alleged misrepresentations are.

The alleged misrepresentations relied upon by the Plaintiff in this case were five in number; as to four of them Mr. Justice *Fry* was in the Plaintiff's favour; as to the fifth he was against him; but I cannot find out from the judgment of Mr. Justice *Fry* on which of the misrepresentations he relied. He tells us in the beginning, and tells us fairly, he takes it as a whole. He finds four proved, but he does not tell us whether any one of the four, or which of the four, or whether the four together would be sufficient. That being so, I will now consider each of the alleged misrepresentations in detail, and will give my reasons for thinking that not one of them is sufficient to authorize the Court to decide that the Plaintiff is entitled to recover from the Defendants the amount which he has lost, through entering into this unfortunate speculation.

The first misrepresentation is as to the names of the directors. Now it is to be observed that in the prospectus there were the names of eight directors, one being the managing director, who in the letter is stated to be, as he was, a man of experience. As to the others, there is nothing to my mind which is obvious on the face of the prospectus, to shew that a man would be induced to enter into a contract by reason of there being any particular name. What I mean is this. I agree that the names of the directors form an important element with many people as to whether or not they shall decide upon joining a company, but that must depend on their knowledge of the directors, their personal knowledge, or knowledge of their names and positions, otherwise the mere fact of stating that such and such persons are directors will be nothing. Again, I agree that you may have names so well known, so notorious in connection with the subject-matter of the prospectus, that even the Court would come to the conclusion that the name, even of a single director, was an inducement to persons to join the concern. To give an illustration of

what I mean: Supposing a new bank was proposed, and you were told that one of the directors was the head of the firm of *Rothschilds*, or of *Barings*, and was so described, it is obvious without any further discussion that that was held out as an inducement to join, and was a material inducement to join. But if you were told that one of the directors was *William Jones* of the *New Cut*, or *Thomas Smith* of *Ratcliffe Highway*, you would not come to that conclusion; but you would then require evidence to shew that the Plaintiff relied on the name. It might be proved by the evidence. He might shew that the *Smith* or *Jones* in question was his intimate friend, that he had the greatest respect for him, and that he always acted on his advice in joining commercial undertakings, and that it was that name which induced him to join. Then I think he might say that this publication of the one name was a material misrepresentation. But in the absence of some evidence of that kind, in my opinion it is impossible to support an action of deceit simply because one name out of eight happens to be wrong; that is, that the man having once consented to be a director had withdrawn his consent, if he had withdrawn, before the prospectus was issued. It would be to my mind extravagant, without some evidence of reliance on the part of the Plaintiff, to say that the Court should so decide. But in addition to that, there may be, and in this case there is, positive evidence from the Plaintiff to the contrary, which I will refer to presently; but I think it right, considering the very severe observations which have fallen from the learned Judge in the Court below regarding Messrs. *Chadwick's* conduct in this matter, to say that I do not agree with them.

The facts are these: The name of the director in question was *James J. Grieve*, M.P. for *Greenock;* M.P. is worth something, but not much in these days as regards recommending a company to the acceptance of the world, and that is all I can find about this gentleman on the face of the prospectus. But the evidence is this. On the 23rd of May Mr. *Grieve* consented to become a director. On the morning of the 26th, the circular being sent out with the prospectus either on the 26th or 27th, it does not matter which, but after the receipt of the communication which I have mentioned, Messrs. *Chadwick* got a telegram from Mr. *Grieve* to this

C. A. 1882 SMITH v. CHADWICK. Jessel, M.R.

effect: "Your movements are too rapid for me. Cannot conclude finally until I hear from Mr. *Morton* regarding necessary inquiries." They then write a letter stating that they had already printed a large number of prospectuses, and although they talked of "consternation" they decided to send them out, "notwithstanding the telegram, as Mr. *Morton's* reply cannot fail to be satisfactory, having consented himself to join the board."

Now, I have to consider two things; what was the meaning of Mr. *Grieve's* communication, and what was the meaning of their acting upon it? Mr. *Grieve* did not withdraw his name when he said that "Your movements too rapid; cannot conclude finally." He did not say, "I shall withdraw my name," and in my opinion he did not withdraw. He reserved to himself the right to withdraw. He did not finally agree to remain a director, if he had agreed to become one, and the way I test it is this. Supposing on receipt of that telegram they had struck Mr. *Grieve's* name out and put in somebody in his place; would not he have had a right to complain? He would have said, "I did not withdraw, I wanted to make necessary inquiries; you should not have put anybody in my place; you should have given me time to get answers to the inquiries." There is no actual withdrawal. At the same time I think Messrs. *Chadwick* were wrong in printing his name after that. They should either have said, he has consented to become a director, subject to power to withdraw, or should have left him out. I do not say they were right in doing what they did, but I entirely dissent from the statement that it was a most unscrupulous and improper proceeding.

So much for their conduct, but it is not on that I decide. If it had been shewn that instead of the name of *James J. Grieve*, it had been a man of such position in the financial world that his name alone would have carried the prospectus, I should have said that it was a material misrepresentation; but when I turn to the evidence, it is, in my opinion, conclusive that it was not, as regards Mr. *Smith* at all events. For in his evidence he says that he never heard of Mr. *Grieve* before; and when asked if seeing Mr. *Grieve's* name had any effect on him he answered by a shake of the head. In this particular instance, therefore, even assuming that the name was improperly placed on the prospectus—and I

do not think it was rightly placed, and I do not wish to say I sanction any such proceeding—I think it is a wrong and imprudent proceeding, but I do not think it was more than that; but even assuming that it would be an inducement to the Plaintiff, and was not material, I should have assumed, as I said before, in the absence of evidence, that it would not be sufficient to maintain an action of deceit. But we have positive evidence that it was not that which induced the Plaintiff to take the shares. That I think disposes of number one.

The next point is a very singular one. The prospectus states that the company is formed for the purchase of Messrs. *Hannay's* works. It then states: "The whole of the properties have been valued under our own instructions; the ironworks by Mr. *W. W. Hulse*, of *Manchester*, and the collieries by Mr. *William Armstrong*, and the total value, exclusive of stocks and stores, amounts to £301,000." Then it goes on to say that "The land on which the works are situated comprises about seventeen acres, and is held in perpetuity, subject to a very reasonable annual ground rent or feu duty." So it tells them the land is about seventeen acres, and it says, "the whole of the property has been valued under our own instructions." All that is true. The quantity of the land is right; and it is true that it was valued under their own instructions, as to the ironworks, by Mr. *Hulse*, of *Manchester*, at £277,000; the difference between that and the £301,000 is the value of the collieries. When you come to look at it, it is this. Messrs. *Chadwick* had given instructions to Mr. *Hulse* to value the property, describing it as seventeen acres. The railway had not been made. The railway agreed before this time to take three acres of land from Messrs. *Hannay*, the proprietors of the works; and therefore Messrs. *Hannay* were no longer the owners of those three acres in equity. They belonged to the railway company; the railway company had not yet paid for them, and they were to pay a large sum of money for the land and for the damage done by severance. Of course they are put together in railway compensations, and you can never apportion them exactly. That being the position of matters, as Messrs. *Hannay* had only seventeen acres to sell, the other three acres which made up the twenty did not belong to them. Those three acres were part of a large piece of

C. A. 1882 SMITH v. CHADWICK. Jessel, M.R.

land which was used as spoil or tipping ground, and it appears by the evidence was covered to a great depth by scoriæ from the iron furnaces. I mention that because it has some bearing on the question of value.

It appears (and I have looked at the matter with a great deal of care) that by some mistake—how it arose I do not know—Mr. *Hulse*, instead of valuing, as he was told, the seventeen acres, valued the twenty. The mistake was not found out by Messrs. *Chadwick*, although they had in their possession the materials for finding it out; that is, they had the valuation, and if they had studied it very carefully they might have found it out, but they did not. That alleged misrepresentation is this; that it is represented that *Hulse* and *Armstrong* valued those properties at a total of £301,000, whereas in fact they valued them plus three acres of spoil ground at that sum. The first question to be asked is: Will this support an action of deceit—a mistake of that kind? I do not think it would; I do not think the mere non-discovery of a mistake—a small mistake, for it was one, in documents in your possession—is that amount of carelessness or recklessness which will make a man liable for stating that which is incorrect if he believes it to be true. But I do not wish to decide it on that ground, because there is a better ground, in fact there are two better grounds. The first ground is that the matter in fact was so small as to be immaterial. The valuation we have before us, and Mr. *Hulse* tells us the exact figures at which he values it. He values the land, which he says in his report he takes at twenty acres, at £23,176. He shews by his report that the works occupy about half the land; it is not exactly half—about eleven to nine; and the other half was occupied by spoil ground and that sort of thing. As I said before, the railway takes the spoil ground. Now, we do not want a valuer to tell us that the portion of land near *Glasgow*, on which the works stand, is certainly of more value than the spoil or tipping ground, which is covered by scoriæ, and is occupied in this way; and, indeed, there is evidence on this subject afforded by the valuation itself, for he tells us this about the spoil ground: "There is besides a large area of freehold land, immediately adjacent to the works, available as tipping or spoil ground, which may be purchased at a very low feu duty." I

should have arrived at the same conclusion that the spoil ground covered with scoriæ was not of the same value as ground covered by the works, even without that statement; it is quite plain that it is not. Consequently we have twenty acres which are valued at £23,000. I should say it is clear from that statement that the spoil ground being of less value, £1000 per acre for the spoil ground was very handsome indeed; even if we average it, it would not have arrived at much more—a little more than £1000 an acre. He is asked how he valued it, and he says he valued it at a little more than £1000 an acre all round. He is then asked to say how many acres he valued. He cannot tell. He asked to refer to his memoranda, but he is not allowed; I think he ought to have been, but I have no doubt his answer would have been that he did value twenty acres. There is some mistake about it. Then it comes to this, that the three acres valued have been wrongly included, and they have been included at a value of £3000 or less.

Now upon this it appears to me the learned Judge in the Court below, with great deference to him, made a very curious mistake. The total amount of misrepresentation could not be more than £3000, and that in a total purchase of £301,000, without reckoning the stores. The total purchase was nearly half-a-million. Is that a material representation, occurring in the way I have mentioned, they having given the right instructions to Mr. *Hulse*, and he, having made a mistake which they had not found out? Could that support an action for deceit—£3000 out of £301,000? I should say not—decidedly not.

Well, then, how is it that Mr. Justice *Fry* relied upon it? I will state how, because that also brings me to another point in the case.

The railway company gave upwards of £16,000 for purchase-money and compensation for severance. We know how railway companies have to pay for land, and we know how they pay for compensation for severance. It does not at all shew that the land or spoil ground is worth one penny more than Mr. *Hulse* valued it at, because they paid this large sum. In fact going through a manufactory, we know that not being compelled to take the whole they must pay a very large sum. The consequence, therefore, would

C. A. 1882 SMITH v. CHADWICK. Jessel, M.R.

be, that if the company had got this land and had sold it to the railway company they would have got £16,000. Now you will see, if you look into the contract, that they made this additional bargain. They—that is, the persons acting for the proposed company (Messrs. *Chadwick*)—said to the Messrs. *Hannay*, "You take £10,000 from the railway company, and divide the surplus, whatever it may be, with the new company;" and they agreed to do that. So that in that contract, which is referred to in the prospectus, although not set out (and the man is told he may look at it, which he did not), the above £3000 is added in favour of the company. That is, the mistake is rather more than corrected. The mistake in the valuation was putting down £3000 too much; but rather more than £3000 is given to the company in respect of the land by their taking half the surplus. In reality it came to nothing when you take the contract and valuation together—absolutely nothing. But the learned Judge in the Court below thought that there was an error of £13,000, instead of being no error at all, and the way he arrived at it is this: he said, "You have got a statement that what Mr. *Hulse* valued you were to have, and, therefore, you were to have the land taken by the railway, that is, £16,000; you only get £3000, therefore there is a loss of £13,000." The mistake is obvious. The representation is not that you were to have what Mr. *Hulse* valued. You were told what you were to have. The misstatement is that he valued it with Mr. *Armstrong* at £301,000. That is the misrepresentation. There is no statement that they are to have twenty acres, and that is the ground of the mistake, that there is a difference of £13,000. It is really no difference at all, and that ground entirely fails, in my opinion, as the first ground does.

The next is a very curious point, in which also I have the misfortune to differ from the learned Judge below, both as to his construction of the prospectus and as to the law applicable to the case. It is in this way. The actual contract was that the purchase-money was to be paid partly in cash and partly in paid-up shares; and the cash was to be paid in four instalments, with interest in the meantime. That was the contract. The prospectus states this: "The purchase-money is payable to the vendors as follows: £100,000 in 2000 fully paid-up shares of the

company, and the remainder in cash in four instalments; namely, one-fourth on taking possession of the property, one-fourth in six months, one-fourth in twelve months, and the balance in eighteen months." It says nothing about the interest. It says when it is to be paid, but there is nothing about interest. But it says this: "A contract has been entered into between Messrs. *Hannay* of the first part, and *Adamson* the younger of *Manchester* on behalf of the company of the second part, made May 21st and 23rd, 1873. Copies of such contract and of the valuations and of the memorandum and articles of association may be inspected at our offices, or at the offices of the solicitors in *Glasgow* and *London*." Now, the contract stated the interest to be payable; the prospectus does not state anything about it. It is a mere omission. There is nothing untrue in the prospectus. It exactly states the fact, but omits saying anything about interest on the instalments. How can that be a false representation? It is a mere omission. It is said that the mere fact of stating that your purchase-money is to be paid by instalments excludes the payment of interest; I see no reason why. It is absolutely silent, and that is all. Now, the statement therefore is defective, but that statement is supplemented by a reference to a copy of the contract. It has always been held, and I think rightly held, that if a man in a prospectus or in a written statement, particulars of sale or otherwise, falsely states the contents of a written document, he cannot escape from such false statement by saying, "I offered to shew you the document." But if he makes an incomplete statement, altogether true but imperfect, I take it he can. He says, "I did not mislead you at all; I did not state the whole of it; I said go and look at the whole of it; the whole of it is in a copy which you can see; I did not profess to state the whole of it; I put you on your guard; I said you can go and look at the whole of it." Can he escape then? We have a similar point constantly arising on particulars of sale. Suppose a man states some of the covenants of a lease, but does not state a restrictive covenant on carrying on trade, says nothing about it, but says go and look at the lease, can a purchaser complain? If, on the other hand, he says there is no restrictive covenant, and there is, then a purchaser can complain. I take it on this prospectus there being no mis-statement, and

C. A. 1882 SMITH v. CHADWICK. Jessel, M.R.

there being a reference to a full copy, the Plaintiff is not entitled to complain of the omission of the interest.

Then how does it happen that the learned Judge in the Court below came to a contrary conclusion? He cites the language of Lord *Cairns* in *Peek* v. *Gurney* (1), language which, as usual with that learned Judge, accurately represents the law. He is speaking of an action of deceit, and he says, "There must in my opinion be some active mis-statement of fact, or at all events such a partial and fragmentary statement of fact as that the withholding of that which is not stated makes that which is stated absolutely false." That is the language of Lord *Cairns*. How can that support this? What falsehood is there here? It is absolutely true. There is nothing withheld which makes it false. What Lord *Cairns* is referring to is a case of this kind, where you state a thing absolutely and there is something cutting it down which is withheld. For instance, if you sold an estate in fee simple in possession, of course it would be untrue if you knew there was a lease upon it. But suppose you left out the words "in possession," but sold the estate in fee simple and then kept back the lease. The words in fee simple standing alone, meaning in possession, when you keep back the lease, you do make that absolutely false, because it is not a fee simple in possession. That is, the thing withheld is a qualification or a cutting down of the statement which if stated would make it absolutely false. As I said before it appears to me, with great respect to the learned Judge, to have no application to such a case as this. Then he goes on to say, "It appears to me that this statement comes exactly within that principle. To state that the principal is payable at a given date, and to say nothing about interest when interest is payable, is a partial withholding of facts and such a withholding of that which is not stated as makes that which is stated absolutely false." All I can say is I am utterly at a loss to follow that reasoning. It does not appear to me that it comes within the principle stated by Lord *Cairns;* but on the contrary, I think the statement of Lord *Cairns'* law shews that it does not amount to such a mis-statement at all as will make anything stated in the prospectus false, in any event or in any respect. It seems to

(1) Law Rep. 6 H. L. 377, 403.

me that on this point the complaint is absolutely groundless for both reasons—both because you might have looked at the contract, and because there is nothing withheld which makes the statement false in any shape or in any way.

Then it was said the company gave bills for it; there is nothing said about bills in the prospectus, and the result of giving bills was that they got into the hands of holders for value; I only mention this to shew I have not skipped any part of the argument —therefore the company had not the benefit of the guarantee which was given as regards the paid-up shares. All I say upon that is, there is no representation that they had or had not given bills. There, again, there is no ground that I can see for finding fault with the contract. That disposes of the third ground.

The next point is one of considerable importance, but it was one as to which Mr. Justice *Fry* was against the Plaintiff. It was this. The ironworks were sold as ironworks, and they are sold as extensive ironworks—"the well-known ironworks"—and a most material point is the capacity of the ironworks, that is, the quantity of iron they could produce. Now, as to that there is a positive statement that "they can now produce at the rate of 1500 tons of finished bars and plates per week, or about 75,000 tons per annum." I may refer also to another statement in the prospectus, which says this: "In making the valuation there has been no addition for goodwill, and no premium or intermediate profit of any kind." It has been argued before us that the negative implies an affirmative, and because they said "no addition has been made for goodwill," it therefore is to be assumed there was a valuable goodwill given for nothing. According to my experience that is not the practice of men of business. If there was a valuable goodwill I suppose the vendors would like to be paid for it, and the statement that nothing has been added for goodwill would convey to my mind that nothing had been added, because it was worth nothing. I do not agree that there was any sale of goodwill set forth by the prospectus. It is included in the contract for what it is worth; but there is another observation also, that this is not the kind of business to which goodwill attaches; it may be, but it is not likely. There is a large number of businesses in which there is nothing appreciable in the shape

C. A. 1882 SMITH v. CHADWICK. Jessel, M.R.

of goodwill. I have known over and over again evidence given that there was no goodwill, or goodwill worth anything. In this particular case I have no doubt the goodwill was worth nothing, for the business had been carried on at a loss for several years. But I am not left to my own opinion in the matter; there is evidence upon it, and the evidence is positive that the goodwill is worth nothing. It is the best possible evidence, for it is the Plaintiff's own. In answer to the question: "You do not know what you complain of in your statement of claim? You know there is a serious complaint made with regard to the goodwill?" he says, "There is no goodwill." You must remember the Plaintiff is a steel manufacturer, and knows something about business, and about this business, so that he knew there was not a goodwill; therefore there is no representation, as I said before, that there was any, and there really was not. But, as I have already said, there is nothing said about past profits, or of there being future profits.

Now, was it true that these works could produce 1500 tons of finished bars and plates per week, or about 75,000 tons per annum? That, of course, must be a question of evidence, and upon this part of the case the evidence was oral; it was taken before the Judge, and Mr. Justice *Fry* came to the conclusion that it was proved as a fact that the works were capable of producing the quantity of bars and plates mentioned. There was in this case evidence on both sides. There was the evidence of Mr. *Hulse* and of Mr. *Ferrie*, that the works were capable of producing it. There was the evidence of Mr. *Neilson*, the managing director, who said they were not. He said, when he saw them he thought they were, but when he came to work the furnaces he found defects which prevented their producing it. The learned Judge, having seen the witnesses, came to the conclusion that the fact was proved. Now, according to the rule which governs the Appeal Court in deciding a question of this kind, where there is a conflict of evidence, and the testimony is oral, and the Judge has given an opinion on one side, the Court does not interfere with that unless it sees some clear evidence of mistake, or a gross miscarriage. Applying that rule here, I take it, that even if I had formed no opinion of my own I should not disturb the conclu-

sion of the learned Judge on this point, that is, that it was proved that the works were sufficient to produce 1500 tons per week, or about 75,000 tons per annum. But I must say, on looking at the evidence, and judging as well as I can from the written evidence, I should have come to the same conclusion. I do not give it as my conclusion because I have not seen the witnesses; but on the evidence it seems to be this, that the works were sufficient to produce the quantity, but that Mr. *Neilson* did not take the proper means of working them; that they might have been worked faster, or in a different way. Of course, all this is matter of opinion of experts. I can form no opinion of my own except from what they say, that if they had been worked in a different way the works would have produced the whole quantity mentioned; in other words, that the defects were not in the machinery, but were in Mr. *Neilson's* management. That is the case on the other side. That being so, and it being proved to the satisfaction of the learned Judge on the oral testimony that they were sufficient, I think we have nothing further to do with it. But I may make this remark, that even if I had arrived at a contrary conclusion, I should hold that the statement would not support an action of deceit, because Messrs. *Chadwick* believed that that statement was true, and they had reasonable ground for the belief; they had an actual report by a gentleman selected on account of his great knowledge and experience, Mr. *Hulse*, who had so reported to them. Therefore, if it had been untrue it would not have supported an action for deceit, and this representation, therefore, may be dismissed as well as the others.

But my conclusion as to the truth of it has a material bearing on the next, which to my mind is the only difficult question in the case, and that is the question as to the meaning of a line in the prospectus, which says, "The present value in the turnover or output of the entire works is over one million sterling per annum." The Plaintiff will not tell us how he read it. He says he read it for what it obviously means. Mr. Justice *Fry* came to a conclusion not only that it obviously meant something, but that it was impossible on any ordinary construction of the English language that it should mean anything else. Now, the singularity of the case is this. Mr. Justice *Fry* has come to the conclusion

C. A. 1882 — SMITH v. CHADWICK. — Jessel, M.R.

that it is perfectly plain what it means. He says it is a simple question of the construction and meaning of the English language, and he says it is that you have the present value of the present output. Those words are not there; he says, "I so understood the words when I first read the prospectus, I so understand the words after having heard the able argument of counsel for the Defendants." Then he goes to another matter on which I have to comment; he says that he is confirmed by the circular. Now, the circular of the 3rd of June did not reach the Plaintiff until after he had made his application for shares. He does not suggest that he ever intended to withdraw, or that the circular induced him not to withdraw. Indeed, that point was not taken before us. But Mr. Justice *Fry* thinks he is entitled to look at that circular with a view to construe the contract, that is the prospectus. I think he was not. In the first place, the notion on which he proceeded, that of construing a contemporaneous document, has to my mind no application. The document in question, the circular, was drawn up by Mr. *Adamson;* the original prospectus was drawn up by Mr. *Oldfield Chadwick,* but was certainly shewn to the other partners, they had some knowledge of it, although they were not the draughtsmen. Again, as to the circular, it is not clear whether they all saw it; I suppose they did, but still there is this to be said, that it does not emanate from the same mind. When the Plaintiff asked for the shares he knew nothing about the second document. How could his mind have been influenced by an interpretation put upon it by the second document? It cannot be said you must have meant this when you wrote the document, because you said so afterwards, or wrote so afterwards; that would be assuming that all the Defendants were parties to the second circular, but that is not allowed in the construction of written instruments. You cannot affect the construction by what one party says is the construction. That will not do. The suggestion is, it is like contemporaneous documents between the same parties; but in the first place, these were not contemporaneous. The interval between the 27th of May and the 3rd of June is important; and in the next place, the doctrine as to contemporaneous documents rests on this, that when documents are actually contemporaneous, that is, two deeds executed at the same

moment, a very common case, or within so short an interval that having regard to the nature of the transaction the Court comes to the conclusion that the series of deeds represents a single transaction between the same parties, it is then that they are all treated as one deed; and, of course, one deed between the same parties may be read to shew the meaning of a sentence, and be equally read, although not contained in one deed, but in several parchments, if all the parchments together in the view of the Court make up one document for this purpose. As I said before, the doctrine has no application in my opinion to the case before us, and the learned Judge was not justified in reading the circular as explaining the meaning of the prospectus.

Beside this, if I were to be critical, I find that the words of the circular are different from the words in the prospectus; and they do not afford me, I must say, speaking for myself, that assistance which they did afford to the learned Judge in the Court below as to construing the prospectus, even if the circular had been admissible for the purpose. It appears that this had some influence with the learned Judge, but I cannot tell to what extent. He says: "I am using the statement in the circular now, not by way of any independent statement of the Defendants, but only as it appears to me to be a contemporaneous exposition of the meaning of the statement in the prospectus as used by the Defendants themselves." I must, therefore, come to this conclusion, that if he had not used the circular he would not have been quite so clear about the meaning of this line, and therefore, in differing, as I have differed to some extent only, from his conclusion, I am not sure that I should differ from him if he had not had resort to the circular.

Now, what does the line mean? It is a very difficult line, and what is most singular is this, that Mr. Justice *Fry*, having with some assistance come to the conclusion that it means one thing, I have come to the conclusion that it has an ambiguous meaning, that it may mean one of two things; one of the Lords Justices has come to the conclusion that it means one of the two, and the other Lord Justice has come to the conclusion that it means the other of the two. You cannot have a better illustration of the difficulty of knowing what it does mean. Assuming that it is capable of two

C. A. 1882 SMITH v. CHADWICK. Jessel, M.R.

meanings, what is the evidence? I take it that when a representation is capable of two meanings, and a man comes to complain of being deceived, he is bound to tell the Court which meaning he attached to it, because he may have attached to it a meaning which the Court does not attach to it, and then he was not deceived at all. If the Plaintiff will not tell us which meaning he attached to it we cannot say he was deceived. He says it is the obvious meaning, and there is no obvious meaning. After what I have said of the difference of judicial opinion, I think I may say that. Therefore, I am utterly at a loss to know how the Plaintiff read it, or what he relied on. If there is no obvious meaning, how can we say that there was any deception practised upon him? The Defendants say, and they give reasons for it which to my mind are conclusive, that they meant that line to mean the present value of the output as stated by them to be producible by the works, and they tell us how they arrived at that conclusion, namely, they could not get the actual output, because the books were not shewn to them, but they were told by Mr. *Hannay* that bar and plate iron in the proportion produced by the works were then worth about £15 a ton; they multiply 75,000 tons by 15, and then get their £1,000,000; that is how they arrive at it. But be that as it may, it is for us to decide whether there is an obvious meaning, and what it is. The words are these: "The present value of the turnover or output of the ironworks is over £1,000,000 per annum." As I read it at first, I read it in the same way as Mr. Justice *Fry*. The word "turnover" is not correctly used unless the whole of the output was sold in that year; if it was it would be correct, because the turnover is money, that is the money value of the vend; output is the actual produce. If the whole of the actual produce is sold within the year, then of course the money value of the actual produce is the turnover. Therefore, it is quite plain that the words are not very accurately used. It is the present value of the turnover. Now, you cannot have any other value of the turnover than its actual value; that is impossible. I think the word "turnover" must be rejected, and you must read it as the present value of the output, the word "turnover" being inaccurately used as a synonymous term. "The present value of the output of the entire works is over £1,000,000 per annum." What does

that mean? It may mean several things; it may mean the present value—that is the present value according to the price of iron of the produce for the present year, that is this year, up to this moment; for one year; or it may mean the average annual value of the produce for several years; or it may mean the present value of the total expected produce, assuming it, as stated to be, 75,000 tons per annum. I think it might mean any one of the three. If you say a man's present income is £10,000 a year it may mean that his average income for a few years past has been £10,000 a year; or it may mean that his income from his estate for last year was £10,000; or it may mean that he is now in possession of an estate which during the current year will produce £10,000. A man who has come into an estate last month of £10,000 a year might say his present income is £10,000 a year quite correctly. It may mean any one of those three things, and I cannot tell *à priori* which of the three is meant; and so here I cannot. It appears to me to be ambiguous. Then, for the reasons I have given, I think the Plaintiff's case fails, for he does not tell us in what sense he understood it. I cannot come to the conclusion that he was deceived at all. There is another circumstance about the present Plaintiff which may not apply to any other; he is in the trade; he knew the price of iron, both of bars and plates. What the actual price was is not proved, but the evidence for the Defendants shews they were told it was £15 a ton. Iron, both bars and plates in the proportion sold from these works up to the time of the last order, a few weeks before this time, was at an average of £13 5*s.* a ton, but iron was rising, and the proportion might change; therefore I think £14 or £15 a ton was not extravagant, and that would produce the amount in question. The Plaintiff being in the trade must have been perfectly aware that if the capacity of the works was only to produce 75,000 tons per annum, and if the price was not above £15, but rather below it, the present value of the output could not mean the value of the actual produce. Everybody in the trade must have known that there are such things as strikes of workmen, breakages in machinery, want of orders occasionally, and so on—that you never do produce up to the actual capacity of production. Therefore a man who knew the price per ton, and I assume the

C. A. 1882 SMITH v. CHADWICK. Jessel, M.R.

Plaintiff did know it, could not have been deceived; he could not have imagined that they actually did produce this quantity.

But passing from that, there is another point in the case which, in my opinion, is also adverse to the Plaintiff. Was this a material inducement independently of the evidence—that is, could the Court treat it as a material inducement, even assuming that it was to be read in the way it was read by Mr. Justice *Fry*—a material inducement which made the Plaintiff enter into the contract? That is, it must have been so obvious that, in the absence of evidence, the Court would come to that conclusion. In my opinion there is nothing of the kind. The prospectus does not proceed on past profits, or on past extent of business. If it had done so, of course the greater vend the greater the loss, if the business were carried on at a loss, and that will not help the matter. But it does proceed on the capacity of production of the works, and on the hope of the future. Consequently this statement is a statement to shew the capacity of production. Now if there had been no other statement it would have been most material, because, as you have said, you are buying works of an extensive character, which have produced in times past produce which at present prices is worth more than £1,000,000 per annum; that is a guide to you—a material guide—but a guide as to the extent of the works, and as to their power of production. But, as I said before, it is an imperfect guide, and for this reason: Assuming it to be, which is the strongest reading in favour of the Plaintiff, that that has been the average production for some years past, everybody knows that machinery wears out, and the mere fact that the average has been so many thousand tons per annum does not shew that the works will continue to produce that quantity. It may mean that the production at the beginning of the average years was larger than at the end. Then, of course, if it were examined carefully, it would shew that it would not continue to produce it, and that in any event it is an imperfect test. It is not like a thing which cannot change; there the past production would be evidence of the power of future production; but where we have a thing wearing out like machinery, of course it is a very imperfect test as to the power of production.

That being so, was it material? It was not material, in my

opinion, as an inducement to the Plaintiff, because the actual power of production was stated as a fact, which he was entitled to rely upon. He was told that the production was at the rate of 1500 tons a week, or about 75,000 tons per annum. That was supplemented, we may say, by evidence; but we do not want evidence—imperfect evidence—to establish a fact which is stated to you as a fact; you are entitled to say—I rely on the statement of fact; the reasons which induced you to come to the conclusions of fact are for you; what I do rely on is your statement of fact; and, there being that statement of fact, it appears to me the most favourable way you can put it for the Plaintiff is this—they can produce 75,000 tons per annum, and they have produced it. The material fact is the power of production in the future, not the quantity produced in the past. Therefore, in my opinion, in the absence of evidence, the Court would not be entitled to come to the conclusion that the statement was a material statement to induce the Plaintiff to enter into the contract, and he is not entitled on that ground to support an action for deceit.

On the whole I have come to the conclusion that this, although in some respects inaccurate, and in some respects not altogether free from imputation of carelessness, was a fair, honest, and *bonâ fide* statement on the part of the Defendants, and by no means exposes them to an action for deceit. And I cannot, I think, do better than conclude my judgment with a quotation from a well-known judgment of Lord Justice *Turner* in *Jennings* v. *Broughton* (1), which I think emphatically applies to this case: "And, finally, I think that although it is the undoubted duty of this Court to relieve persons who have been deceived by false representations, it is equally the duty of this Court to be careful that in its anxiety to correct frauds, it does not enable persons who have joined with others in speculations to convert their speculations into certainties at the expense of those with whom they have joined. That, in my opinion, would be the effect of giving the Plaintiff the relief which he asks, and I think, therefore, that this bill has been properly dismissed." That is the result I have come to. I think the appeal should be allowed and the action dismissed with costs.

(1) 5 D. M. & G. 126, 140.

C. A. 1882 SMITH v. CHADWICK.

COTTON, L.J.:—

This action, although brought in the Chancery Division, is a mere common law action of deceit. In order to entitle the Plaintiff in such an action to relief, it must be shewn, first, that representations which in fact were not true had been made by the Defendants; that those representations were made by the Defendants, either with a knowledge that they were not true, or recklessly, in which case, although they knew not of the untruth, they would be liable as if they had known that the statements were untrue. But that is not all. It must be shewn also that the Plaintiff was deceived, and induced by the deceit that was practised upon him to do something to his prejudice, in respect of which prejudice he claims damages. In the present case those matters have all to be considered.

What are the representations on which the Plaintiff relies to make out his case? They are contained entirely in the prospectus and letter annexed to it. I say so, because although a circular which was sent round by the firm of the Defendants was put in evidence, it has hardly been contended here, and could not be contended successfully, that the Plaintiff in this action could rely on any misstatement, if there were any contained in the circular, as entitling him to relief, he having done the act by which he was prejudiced before he received that circular.

After the full manner in which the Master of the Rolls has dealt with the evidence it will not be necessary for me to enter into the case in great detail, but I think it right as it is a case of importance to go through the principal points and see what are the misrepresentations relied upon. The first is the statement that *James J. Grieve* had agreed to be a director, when in fact the Defendants knew that he had not. I must say that in my opinion the Defendants acted improperly in publishing the circular which they did publish after they had received the telegram with his name as a director without any qualification, because at least they knew that he retained to himself the right not to continue a director; I think more than that, they knew that he had not made up his mind to be a director, and neither as regards him nor as regards those to whom they sent the circular, was it right in them to issue the prospectus with his name as one of the

directors of the company after they had received that telegram. But it is a very different thing whether that is any ground for entitling the Plaintiff in this case to relief. And here we have evidence to shew that in fact he was not induced by that statement in the prospectus to act as he did and apply for shares; because, as the Master of the Rolls has already mentioned, when examined he by a shake of the head stated that he did not attach importance to the name being there; that was not an inducement to him to take his shares. I give no opinion at all as to what would have been the result if that had been the inducement, whether the name of one director would have been sufficient, but I say this, that this would be entirely a different case from those which have been referred to, where there is a substantial misstatement, as I think occurred in the case before the Master of the Rolls as to the board of directors. Here there would be only one name inaccurately stated, and that of a man not so connected with the business as that his name being stated there inaccurately would of necessity be an inducement to persons to take shares. I do not at all say that one name put as a director might not be the name of a man in such a position that his name alone being put there with the knowledge that he had not authorized it to be put there would not be a good ground for an action of deceit; the Court might come to the conclusion that of necessity such a name being put there would be an inducement, and if the parties who put the name there knew that they had no authority to put it there, I in no way say that they would not be liable in such an action as this. In the present case there was the name put there improperly, I think, but the Plaintiff has himself said, that that was not an inducement to him to take shares.

There are two other points which I may pass over very shortly. One is the alleged misstatement as to the value It is a misstatement as to the valuation made by Mr. *Hulse*, and it is this—that whereas it is stated there that what was going to be purchased by the new company had been valued with other things at £301,000, what had been so valued was that which was to be purchased plus three acres of land; and that was said to be a misstatement. Undoubtedly that is erroneous, because what was valued was not the seventeen acres and the other property which was to

C. A. 1882 SMITH v. CHADWICK. Cotton, L.J.

be purchased, but the property which was to be purchased plus the three acres. But I quite agree with the Master of the Rolls that the error in the valuation under the circumstances was not £13,000 or £16,000, but £3000 only; and having regard to the very small amount of the error, in my opinion it would not be right, having regard to the circumstances too under which that error was committed (which probably would prevent its being said that it was done recklessly), on that ground to say that the Plaintiff can maintain his action.

The other question is as to the interest on the instalments of the purchase-money. There is not a statement that no interest is to be paid. What is relied upon is the omission to state that interest would be paid, and I should not advert to this but for the matter of principle, namely, that in an action for deceit there must be a misstatement, that mere omission is not sufficient to maintain that action unless the omission makes that which is stated untrue. The passage from Lord *Cairns'* judgment in the House of Lords, which was referred to, if I recollect rightly, referred to the statement made as to half a million being given for the goodwill of *Overend, Gurney, & Co.*, when in fact that was to be retained, and might be reduced to nothing if certain claims were brought in as against the old firm which were to be paid off out of the half million, which shewed that in the opinion of those who put out that prospectus the value of the goodwill was not half a million, but half a million subject to very large deductions, so that the omission of the provision, which was a prudent one, as to retaining part of the half million, keeping that half million as a guarantee against certain losses, did falsify the statement in the prospectus that the value of the goodwill was half a million without qualification. It cannot be that a mere omission is a misstatement unless there is something of the kind which there was in the *Overend & Gurney Case* to make the statement by reason of the omission false.

I now come to the material point in the case. Before I deal with the prospectus I had better get rid of the circular, as the circular was used by Mr. Justice *Fry* to explain the meaning of the phrase contained in this prospectus. In my opinion, that was erroneous. Those two documents were not prepared at the same

time; they were not prepared even by the same person. Undoubtedly, if any one had been induced by the statement in the circular issued by the firm, and had been induced by a misstatement in that to act to his prejudice, although all the members of the firm had not themselves prepared it, yet they would be liable if it was issued by them although prepared by one only of the partners; but it is not reasonable to construe a document settled by three persons by another document, even if it were contemporaneous, prepared by one of them only; and in my opinion you cannot say that because in this circular there is something stated different from that which is in terms stated in the prospectus, the terms used in the prospectus are shewn to mean that which is stated in different terms in the circular. In my opinion, that circular cannot be used for the purpose of interpreting the language of the prospectus.

I do not rely on the point—that goodwill appears not to be purchased. It appears that nothing was to be given for the goodwill; but the goodwill, apparently, such as it was, was included in the contract. What appeared on the prospectus was this, that no part of the valuation depended on any value attributable to the goodwill; that the purchase-money did not in any way depend for its amount on the goodwill or on the amount of business or amount of profit which had been done by the firm whose property was to be purchased. It is throughout the purchase of works, with the right to carry on existing contracts no doubt, but still the purchase of works, and it is on the valuation of those works, together, of course, with the plant and material, that the purchase-money is estimated, and it is that and that only which is referred to for the purpose of shewing how those who offered this arrived at the amount which had to be given for it. Then we come to the particular portion of the prospectus, and that line must not be read alone. It must be read with what immediately goes before it, remembering what I have said, that there is no reference in any part to the profits of the late concern, no reference to the business or amount of business as one of the ingredients in fixing the amount to be given for these works.

We have in the prospectus, "The ironworks are the largest and most important in *Scotland*. They have been equipped in a

C. A. 1882 SMITH v. CHADWICK. Cotton, L.J.

complete, substantial, and permanent manner; they can now produce at the rate of 1500 tons of finished plates and bars per week, or about 75,000 tons per annum. The rolling-mills, with some slight alterations, will be capable of turning out 90,000 tons of manufactured iron per annum." Then we come to the passage, difficult, I agree, of construction. "The present value of the turnover or output is over one million sterling per annum." It is obvious there that the word "turnover" must be improperly used. As I understand "turnover," it is the gross receipts during the period specified of the business, manufactory, shop, or whatever it may be; but to talk of the present value of the turnover —that is, the present value of the money received—is absurd. There is the money, and that is its value. The present value must refer to the present marketable value at the price of the day of something to be sold, and in my opinion therefore we have here "turnover" either used improperly as in the sense of "output" or as a thing which may be struck out as superfluous. Then we come to this: "The present value of the output of the entire works is over one million sterling per annum." Now, in my opinion, having regard to that which goes before, that is not a statement of what had actually been done by Messrs. *Hannay* while they were working, either during one year or during any period of time, but a statement that the capacity of the works, according to the statement already gone before, is such that it would produce a quantity of the value of one million a year, and if that is so, it is simply putting into money that which had already been stated before, as to the productive capacity of the works; that is, the output which can be produced by the entire works is at the present value (not that it would always be, because iron, everybody knows, changes in price), but at the present value it would be one million sterling per annum. That being so, when we come to consider whether there is any misrepresentation there, we are really thrown back to the previous statement as to the productive capacity, not the actual production, but the productive capacity of these works. Mr. Justice *Fry* found that that statement, as to the productive capacity, was true. In my opinion it would not be necessary to go as far as that. I give no opinion on that part of the evidence, because I find that the Plaintiff's evidence, and the

other evidence in the case, shews most clearly that even if the productive capacity had been overstated, the Defendants had such reasonable ground for believing that statement to be true that it would be impossible, assuming the statement to be incorrect, to hold them answerable in an action of deceit. They have Mr. *Hulse*, who had valued it and made that statement. The witness for the Plaintiff, Mr. *Neilson*, himself had examined it beforehand, and at page 25 he states in his evidence that although it was found afterwards that through defects in the machinery this production could not be maintained, yet that when he went and saw it he thought that it would. Can you say, therefore, when the witness for the Plaintiff himself inspected it beforehand, and thought that the works were capable of producing what is here stated, that this is a misrepresentation made so recklessly as, if it were incorrect, to subject the Defendants to an action of deceit? If, therefore, my construction is the correct one, that part of the case breaks down. But I am aware that Lord Justice *Lindley* thinks that another is the better construction, and then it comes to this, that, as the Master of the Rolls has held, it is a passage of ambiguous and doubtful construction capable either of meaning that this is what has been produced by the late firm, or that it is what the works are capable of producing. With great respect to the Master of the Rolls, I think that if it had been a statement that this has been produced, and that this was shewn to be false and made recklessly, it would have been a material statement; for this reason, that a statement made by the Defendants as to the productive power must depend, in the absence of experience, on the report made; all reports may be fallacious, as they were in this case; it would be a material statement if the meaning was not only that an estimate was formed, but that as a matter of fact the estimate had been proved by experience to be a correct one. But the view I take is this: if this is a doubtful and ambiguous paragraph, the Plaintiff has come here not stating in what sense he received it; and on that part of the case I think I cannot do better than read what I said in *Arkwright* v. *Newbold* (1) lest in any verbal variation I should be supposed now to express a different opinion. At page 324 I say:—"In my opinion it would not be

(1) 17 Ch. D. 301.

C. A. 1882 SMITH v. CHADWICK. Cotton, L.J.

right in an action of deceit to give the plaintiff relief on the ground that a particular statement according to the construction put on it by the Court is false when the plaintiff does not venture to swear that he understood the statement in the sense which the Court puts on it. If he did not, then, even if that construction may have been falsified by the facts, he was not deceived."

Now what has the Plaintiff done here? In his pleadings he has put it in this way: "The statement in the prospectus is that the ironworks would then produce at the rate of 1500 tons of finished bars and plates per week, whereas they could only produce at a much smaller rate, and that the present value of the turnover or output of the entire works was one million sterling per annum, whereas the said turnover or output was very much less than one million per annum." He does not state there that the prospectus had said that Messrs. *Hannay* had turned out that, or turned over that. But I rather think that this statement on its true construction is this; you declare that they were capable of producing 1500 tons a week; you also go on to say that the money value would be one million; in fact both statements were false, not that the latter line which I have read and which has been much commented on was a statement that Messrs. *Hannay's* output had in fact been of that amount, and that that was false independently of the falseness of the statement of the capacity of the works. And in his evidence he never tells us "I believed from that statement that Messrs. *Hannay* had in fact turned out of their works that quantity of iron, or of that value"; but only—"I read the prospectus in its ordinary meaning," and he does not condescend to tell us how this particular passage misled him, or what he believed from this passage.

Now, under these circumstances, in my opinion, even although the construction may be that which Mr. Justice *Fry* put upon it; yet how can we come to the conclusion in that state of the evidence that the Plaintiff was induced to act to his prejudice by any false statements made by the Defendants in that respect? Of course it may be that where there is a positive statement in clear terms, it is unnecessary for a man to come forward and say how he understood it; where there is a precise statement of a fact about which statement there can be no mistake, then, if that is

shewn to be false, it may be assumed that the Plaintiff understood it in the meaning which alone it can have; but here where there is a statement at least of doubtful interpretation, I adhere to what I said in *Arkwright* v. *Newbold* (1), that the Plaintiff, coming as he does here, cannot call upon the Court to grant him relief, even if the statement is shewn to be incorrect, and made by the Defendants under such circumstances as to render them subject to liability in consequence of the misstatement so made. Those I think are all the grounds on which the Plaintiff here relies for relief. In my opinion he has not established that there were statements incorrect in fact made by the Defendants by which he was induced to act to his prejudice; or if there is any statement which is incorrect that it was made by the Defendants knowingly or recklessly so as to render them liable.

LINDLEY, L.J.:—

I also am of opinion that the judgment of the Court below cannot be supported. The action is one based entirely on fraud. The Plaintiff says in his statement of claim that the Defendants made the above statements,—which he sets out,—to the Plaintiff, knowing them to be false, and with the fraudulent intention of thereby inducing him to apply for and take shares in the company on the faith thereof, and that the shares so taken by the Plaintiff on the misrepresentation, were worthless, and so on. It is an action for fraud, neither more or less.

Now what has the Plaintiff to prove in order to support such an action as that? He has to prove first of all that the misreprentation was made to him; secondly, he must prove that it was false; thirdly, that it was false to the knowledge of the Defendants, or at all events that they did not believe the truth of it. Then he must prove that it was material, and that he was deceived and induced by the statement to act as he did. As regards the materiality and the deception, the case stands,—not only this case but every case,—in this way. A false statement made may be obviously material, and if so the natural inference would be that the Plaintiff relied upon it, and was misled by it. If the statement is not obviously

(1) 17 Ch. D. 301.

C. A. 1882 SMITH v. CHADWICK. Lindley, L.J.

material a plaintiff may ask the Court, or a jury if he goes before a jury, to infer the materiality from the fact that he understood the representation in such and such a way, and acted in such and such a way, and was prejudiced. Or he may shew affirmatively by other evidence that the statement was material, and that he was deceived.

But the Plaintiff here has launched his case in such a way as I never saw a case launched before. He brings before us a prospectus. He is asked how he understands it; he says, to use his own language—I do not wish at all to paraphrase it, I would rather have it as he puts it himself—"I understand the meaning of such misrepresentations respectively to be that which the words composing them obviously convey, and I am unable to express in any other words what I understood to be the meaning thereof." What does that mean? That means I was induced to take those shares on the faith of the prospectus, and if I can find anything that is false in it, I shall ask the Court to hold that everything I can find which is false was material, and that I was induced by that to take the shares. That is really as I understand how the case is launched. I do not say that it could not be so launched, because if the prospectus was false and fraudulent from beginning to end, the case would be made out, there would be no difficulty in it. But when the Plaintiff asks us to find out what was material, and to infer that it misled him, he is asking us to do more than he is entitled to ask. It is for him to prove what is material, if there is any doubt about it. It is for him to prove falsehood; it is for him to prove it was false to the knowledge of the Defendants, or at all events that they did not believe it, and it is for him to prove that he was misled. It appears to me on every one of the points relied on there is a total failure of proof.

I will go through them one by one. I will take Mr. *Grieve* as an example, for that is the easiest part of the whole case. The Plaintiff does not say he was misled by this name; but he asks us to hold that the insertion of Mr. *Grieve's* name was material, and that it induced him to take shares. Is there any evidence of the kind? The evidence is diametrically opposite. The Plaintiff knew nothing of Mr. *Grieve*. Of course it might have happened that Mr. *Grieve's* name was the one of all others which induced

him to take shares. If that were so the case on that point would be made out, but so far from proving that he was misled by the introduction of Mr. *Grieve's* name, the evidence is to my mind conclusive that it had nothing whatever to do with the matter.

Next as regards the interest on the purchase-money. It appears to me, for the reasons that have been given, that there is nothing wrong in the prospectus about it. The amount of the purchase-money is stated. The purchase-money is stated to be payable by instalments, and nothing is said about interest one way or the other. There again it is impossible for me to come to the conclusion that there is any fraudulent concealment, or that the Plaintiff has been misled. I do not think there was any fraud in it. But suppose it is to be considered in any way a misstatement, which I do not think it was, the Plaintiff has not given us the slightest reason to suppose that he was influenced by it.

Then as regards the land. As I understand the Plaintiff, he puts it in this way. He says your prospectus in substance tells us that the company is to get all the land which Messrs. *Hannay* had, and that the railway company is going to take a portion of it, and therefore the inference is that we shall get the railway compensation. That is the strongest way of putting it. I do not think the prospectus means that. I do not say it cannot be made to mean that; but he does not say he understood it so, and I should not understand it so. I understand the prospectus to state that seventeen acres had been sold with the other property for £301,000. In fact twenty acres were by mistake valued with the other property at that price. There is an error of three acres. But when you come to work out the figures the error is shewn not to exceed £3000, and to be practically immaterial; the Plaintiff's case on this point entirely fails. It cannot be supported except on a construction which I do not think the prospectus bears.

Now I come to the only other point, as to which I confess I have felt and certainly do feel considerable difficulty, and that is the meaning of this phrase, "The present value of the turnover or output of the entire works is over one million sterling." What does that mean? It follows two other paragraphs which relate to the ironworks. The first of those paragraphs says that the ironworks can now produce at the rate of 1500 tons of finished bars and plates

C. A. 1882 SMITH v. CHADWICK. Lindley, L J.

per week, or about 75,000 tons per annum. The next is that the rolling-mills, with some slight alterations, will be capable of turning out 90,000 tons of manufactured iron per annum. Then comes the passage which I have read. With respect to the expression "the entire works," it struck me at first that that would include the collieries, but I do not think it does. The very next clause in the prospectus runs thus,—"the situation of the works"; and I think the expression "entire works" applies to the ironworks and not to the collieries. The construction I put upon the sentence is, that the present value in money of the turnover, or output of the works, that is the present actual, not hypothetical or estimated value, but that which is the turnover or output—(I treat turnover as synonymous with output; I think that is the true meaning of it)—that the present steady output of the entire works is over one million a year. I understand the sentence to mean that that is the work now being done, and if the work goes on at the present rate, and the price of iron keeps at the present price, the yearly value is about that sum. I do not say the sentence cannot mean anything else. It may bear the construction put upon it by the Defendants; and I believe they meant it to be understood in the sense they attribute to it. But I cannot understand it in the same sense. The Plaintiff will not tell us how he understood the sentence; he will not pledge himself to anything whatever on this point. Whether he says it is an ambiguous sentence; whether he hoped that the Court would put upon it a construction which would serve his purpose or not, I do not know. But assume he understood the sentence as I understand it, and let us consider to what extent it is material. That it is material to some extent I have no doubt. I will shew presently to what extent. Whether the Plaintiff is entitled to ask us to hold that it is material in the sense which he puts upon it is quite another matter. I consider it material indirectly, not directly. One thing is perfectly plain, that whatever was bought or to be bought on the valuation, had nothing whatever to do with past profits. The price to be paid was for so much land and the works upon it, with the collieries. With reference to the price, therefore, the statement had no bearing direct or indirect. But that is not all, because I should understand this prospectus as

containing a representation that what was bought was not only so much land with machinery and so on upon it, but was a concern which was going on. The prospectus does not say this in express terms, but I should gather this meaning from what it does say, because it mentions stocks and stores and work in progress; it talks about working the colliery, and so on, and I should infer what in fact was the truth, that this property was at work, and was to be bought at work. Then looking at it in that way, although the price is not estimated on the work done, part of the inducement to a man to take shares would be the circumstance that the concern was at work, and that the amount of work which was being done was 75,000 tons per annum. The statement would shew that what was bought would probably be a success and would influence one's mind in that way. It would be material in that sense, in that direction, and in that direction only. How far this operated on the Plaintiff's mind I do not know. He has not told us how he understood the statement; nor that it influenced him in any way; nor has he proved it to be false or material in the sense in which he did understand it. But it is for him to prove in a case of this kind that what he asks us to say misled him did operate upon his mind and was thought by him material.

Now I pass on to the next thing. Treating this as an action for fraud it is incumbent on the Plaintiff to shew that the statement was false to the knowledge of the Defendants, or at all events that they did not know it to be true. How can he say that, if the real truth is, that they *bonâ fide* understood it in one way and he in another? I do not say an action would not lie in a case of that kind; I rather adopt the language of Lord Justice *Cotton* in *Arkwright* v. *Newbold* (1): "It is true that a person who issues a statement is not only answerable for what he in his own mind intended to represent, but is answerable for what anyone might reasonably suppose to be the meaning of the words he has used;" and there are instances of actions brought on that principle. But when you are seeking to charge a man with fraud, when you say to him, you have falsely and fraudulently stated something to me which induced me to take shares in this company, you cannot succeed by proving that you understood what he said in a sense

(1) 17 Ch. D. 322.

C. A. 1882 SMITH v. CHADWICK. Lindley, L.J.

in which he did not, and that in the sense in which you understood it what he said was false. That does not make him fraudulent according to my understanding of the word. I do not say it would not make his statement actionable if material and relied upon; that is another matter.

Now I come to the last question, whether the Plaintiff has proved that he took his shares in this company on the faith of any of the statements in the prospectus which are alleged to be untrue. I have read his evidence with the greatest possible care, and I cannot come to that conclusion as a matter of fact. The conclusion at which I have arrived, after carefully studying his evidence, is that he knew something about Messrs. *Hannay*—I think nothing very much—but he knew them to be an old-established firm; he knew something in the same way of Messrs. *Chadwick;* he had confidence in them that they would not pass off rubbish or be guilty of issuing a fraudulent prospectus; and his knowledge of the two firms induced him to take the shares, but there was no particular expression in the prospectus which he relied on. He relied on the prospectus as a whole; and as a whole I have not the slightest hesitation in saying I think it is an honest prospectus. We have prospectuses varying in point of fraud in every conceivable degree; many of them are tissues of lies from beginning to end. Here is an extreme case in the other direction. I believe it is a thoroughly honest prospectus; and but for one single awkward expression it appears to me the Plaintiff would have no ground of complaint whatever.

I am satisfied that the Plaintiff bought his shares on the general belief that the company would be successful. He has found out that the prospectus is not true in one sense although it is in another; and he has brought this action, not venturing to say that he understood it in one way rather than another, but putting it in this way: "I ask the Court to believe that I understood it in the sense in which it is false, and I ask the Court to infer that it was false to the knowledge of the Defendants, and that I was induced to take shares on the faith that what was false was true." I infer nothing of the sort; quite the contrary; and so far as I am concerned I think the appeal ought to succeed; and that our judgment should be for the Defendants.

C. A. 1882 SMITH v. CHADWICK.

Russell Roberts asked that the costs of the shorthand writer's notes of the evidence before Mr. Justice *Fry*, which had been printed, might be allowed.

JESSEL, M.R.:—Yes; we have used them.

Solicitors for Plaintiff: *Darby & Cumberland*, agents for *Newstead & Wilson, Leeds.*

Solicitors for Defendants: *Ashurst, Morris, & Co.*

M. W.

C. A. 1881 FRY, J. *Aug.* 3. C. A. *Nov.* 9.

In re LAWES. LAWES *v.* LAWES.

[1876 L. 135.]

Double Portions—Satisfaction—Bond—Articles of Partnership.

L. bound himself by bond to pay to his reputed son £10,000 on a certain day four years later. A few weeks before the day of payment he took his son into partnership, and it was provided in the articles that the capital should consist of £37,500 to be brought in by *L.*, of which £19,000 should be considered as belonging to his son. He also assigned to his son the lease of the premises on which the business was carried on. *L.* died without having paid any part of the £10,000 secured by the bond:—

Held, in a suit for the administration of *L.*'s estate (affirming the decision of *Fry*, J.), that the rule against double portions applied; and that the benefit given to the son under the partnership articles must be taken in satisfaction of the sum due under the bond.

Holmes v. *Holmes* (1) and *Bengough* v. *Walker* (2) considered.

ON the 25th of November, 1868, *Thomas Lawes* executed a bond of that date, whereby he bound himself to pay to his reputed son, *Thomas Lawes* the younger, the sum of £10,000 on the 30th of April, 1872, if he should be then alive.

On the 22nd of March, 1872, articles of partnership were executed between *Thomas Lawes* the elder, *Thomas Lawes* the younger, and *J. E. Randell*, whereby, after reciting that *T. Lawes* the elder had for some years carried on the business of a feather merchant, and that he had agreed to admit *T. Lawes* the younger and *E. J. Randell* into partnership; and that *T. Lawes* the elder

(1) 1 Bro. C. C. 555. (2) 15 Ves. 507.

C. A. 1881 *In re* LAWES. LAWES *v.* LAWES.

employed a large capital in the business, and that in consideration of his natural love and affection for his reputed son, *T. Lawes* the younger, and for divers other good considerations, he was desirous of giving *T. Lawes* the younger for his own present absolute benefit, in manner thereinafter appearing, the sum of £19,000, part of the capital so employed in the business; it was agreed, among other things, that the parties should become partners in the business of feather merchants for the term of fourteen years; but the premises in which the business was carried on, and which were held by *T. Lawes* the elder at a rent of £640, were to be considered as leased to the firm at a rent of £1150, and to be the exclusive property of *T. Lawes* the elder.

The 20th article provided as follows:—That the capital or joint stock of the partnership should consist of £37,500, brought in by the said *T. Lawes* the elder, and represented by cash, book debts, stock-in-trade, &c., agreed by the said partners to be taken and estimated at that aggregate amount, and that the said capital of £37,500 should be considered as belonging to *T. Lawes* the elder and *T. Lawes* the younger in the following proportions; namely, the sum of £19,000 part thereof to *T. Lawes* the younger, being the amount thereby given absolutely and irrevocably to him for his own use and benefit by the said *T. Lawes* the elder, as he the said *T. Lawes* the elder did thereby declare, and which amount was then standing to the separate credit of the said *T. Lawes* the younger in the books of the partnership as representing his capital in the concern, and the sum of £18,500 the remaining part thereof, to the said *T. Lawes* the elder, being the sum then standing to the separate account of the said *T. Lawes* the elder in the books of the partnership as representing his capital in the concern.

The deed also contained a stipulation that in case of the death of either party his share of the capital should be paid to his representatives by half-yearly instalments of £1000 each.

By an indenture of even date *T. Lawes* the elder assigned to his son the leasehold premises in which the business was carried on.

Nothing was paid by *T. Lawes* the elder in respect of the bond. He died on the 20th of May, 1876, having, by his will, dated the 10th of April, 1876, appointed his only legitimate child,

Matilda Lawes, and the said *T. Lawes* the younger, his executors, and *T. Lawes* and his nephew, *A. Durand*, his residuary legatees.

A suit having been instituted by *Matilda Lawes* for the administration of the estate, a summons was taken out by *T. Lawes* claiming payment of the £10,000 secured by the bond with interest thereon. The summons was adjourned into Court, and was heard before Mr. Justice *Fry* on the 3rd of August, 1881.

Glasse, Q.C., and *Alexander*, for *T. Lawes*:—

The difference between the two gifts rebuts the presumption of satisfaction, and parol evidence in support of the doctrine of satisfaction is not admissible: *Earl Glengal* v. *Barnard* (1); *In re Tussaud's Estate* (2). Where a gift is made in the testator's lifetime, it is not so much to be presumed a satisfaction of a debt previously created as if the gift is by will: *Palmer* v. *Newell* (3); and here there is a new consideration for the partnership articles. Satisfaction of a gift made by deed *inter vivos* is not so readily presumed as where it is made by will: *Chichester* v. *Coventry* (4). The illegitimacy of the donee tends to rebut the doctrine of satisfaction: *Wetherby* v. *Dixon* (5).

J. Pearson, Q.C., and *Colt*, for *A. Durand*, one of the residuary legatees:—

The partnership articles were a satisfaction of the debt created by the bond: *Wood* v. *Briant* (6): *Plunkett* v. *Lewis* (7); *Hayes* v. *Garvey* (8).

North, Q.C., and *C. Browne*, for the Plaintiff:—

The son cannot have both the debt and the partnership provision: *Talbot* v. *Shrewsbury* (9). A gift on marriage was held a satisfaction of a smaller debt: *Seed* v. *Bradford* (10), *Chave* v. *Farrant* (11), and a case very similar to the present one is *Bengough* v. *Walker* (12).

(1) 1 Keen, 769.
(2) 9 Ch. D. 363.
(3) 20 Beav. 32; 8 D. M. & G. 74.
(4) Law Rep. 2 H. L. 71.
(5) 19 Ves. 407.
(6) 2 Atk. 521.
(7) 3 Hare, 316.
(8) 2 J. & Lat. 268.
(9) Prec. Ch. 394.
(10) 1 Ves. Sen. 501.
(11) 18 Ves. 8.
(12) 15 Ves. 507.

C. A. 1881 *In re* LAWES. LAWES *v.* LAWES.

FRY, J., after stating the facts, said:—

The question is, whether the deed of March, 1872, is a satisfaction of the debt due from the father to the son under the bond of November, 1868. I think it needless to go beyond the case of *Plunkett* v. *Lewis* (1); in that case Vice-Chancellor *Wigram* considered elaborately the authorities bearing upon this particular question, and he laid down the rule in these terms: "Where a debt exists from a parent to a child, the advance made upon the child's marriage, or upon some other occasion, of a portion equal to or exceeding the debt in the parent's lifetime, shall *primâ facie* be considered a satisfaction." The presumption therefore arises the moment I find that the portion is equal to or exceeding the debt. In this case (although there appears to be no direct evidence bearing upon the point) the indirect evidence convinces me, as a judge of fact, that the £19,000 paid or given in March, 1872, was of equal or greater value than the contingent right to £10,000 on the 30th of April, 1872, a right which would have been defeated in the event of the son dying in that interval; I say I come to that conclusion from the circumstances, and partly from this, that the business appears to have been an old established one, carried on for many years. The son appears to have been desirous of joining his father in the business, which is not likely if the business was an unsuccessful and insolvent one, and the son's deposition states that there was a gift to him of £19,000 by the father, which he accepted in the form of a share in the father's capital. It is then said, that notwithstanding the general rule, there are reasons in this case why the Court ought to hold the presumption to be rebutted. In the first place, the recital is relied upon, and that recital shews that the father intends to give the £19,000 out of natural love and affection to his reputed son. That the recital of natural love and affection where the subsequent second gift is or may be greater than the first gift is not sufficient to rebut the presumption of the second gift being in satisfaction of the first is one of the points decided in the case of *Plunkett* v. *Lewis*, to which I have referred. And however the question might be decided, supposing the second gift were one identical in amount and circumstances with the first, and there

(1) 3 Hare, 316.

were a recital that the second gift was for natural love and affection, which would be inconsistent with its merely extinguishing a prior debt, I cannot help thinking that there is good sense in holding that a subsequent gift for natural love and affection of a larger amount or of a sum which may be larger is perfectly consistent with the presumption which is established in *Plunkett* v. *Lewis* (1). In the next place, it has been urged upon me that this is not a gift of £19,000 if it is in satisfaction to the extent of £10,000 of a debt. That is perfectly true, but the presumption to which I have referred arises in the case of a gift following a debt, and therefore the fact that the second transaction is a gift instead of excluding the rule is one of the conditions which is implied by the rule itself. That argument, in my judgment, cannot prevail.

Lastly, it is said that there is sufficient difference between the gifts to prevent the rule applying. The cases with regard to difference between the two gifts arise sometimes upon gifts by instruments *inter vivos*, sometimes on a will or codicil, and sometimes between an act *inter vivos* and a will, but for the purposes of considering the difference of gifts I think the difference of instruments is not material. Now I find that a covenant by a father to pay a sum of money was in *Chave* v. *Farrant* (2) considered to extinguish a present liability by him to pay the amount, and yet it is impossible not to see that the right of immediate payment in cash is a different thing from the covenant which was contained in the marriage settlement. Again, in the case of *Bengough* v. *Walker* (3), a share of a business was to be taken in part satisfaction of a prior obligation, yet that difference, applying no doubt only to part of the gift, was, nevertheless, held not to be sufficient to rebut the presumption. And, again, recent cases have established that where the second gift is by will the gift of a share of residue if equal to the prior liability may be taken in satisfaction of that. I think, therefore, that the differences between the gifts in the present case are not sufficient to rebut the presumption, and consequently I hold that the bond has been satisfied in the manner in which it has been so found by the Chief Clerk's certificate.

C. W. C.

(1) 3 Hare, 316. (2) 18 Ves. 8. (3) 15 Ves. 507.

C. A. 1881 — *In re* LAWES. LAWES *v.* LAWES.

From this decision *T. Lawes* the younger appealed. The appeal was heard on the 9th of November, 1881.

Glasse, Q.C., and *Alexander*, for the Appellant:—

There is sufficient in the nature of the benefit given by the partnership deed to rebut the presumption of satisfaction. A gift cannot be in satisfaction of an obligation unless it is as absolute as the obligation. Here the obligation was to pay a sum of £10,000 on a particular day, but the capital given by the partnership deed was subject to the partnership liabilities, and was, in fact, locked up in the business. *Holmes* v. *Holmes* (1) is directly in our favour. *Bengough* v. *Walker* (2), on which Mr. Justice *Fry* relied, is distinguishable, for there the benefit given in satisfaction was made up to a certain amount, which exceeded the amount of the portion, so that there was in effect a pecuniary legacy to that amount.

Higgins, Q.C., and *C. Browne*, for the Plaintiff, and *J. Pearson*, Q.C., and *Colt*, for *A. Durand*, were not called on.

JESSEL, M.R.:—

It is not necessary to say whether having regard to recent decisions a pecuniary portion can be satisfied by a gift, not of money, but of money's worth. We can decide this case without touching upon that question.

It is admitted by the Appellant that a voluntary bond given by way of portion to a child to whom the donor stands *in loco parentis* would be satisfied by a subsequent gift or a portion of a larger amount in money. The real question is whether what has occurred in this case does not simply amount to that. *Thomas Lawes* the younger, being the natural son of the testator, the testator stood *in loco parentis* towards him and executed a bond to secure £10,000 to him on the 30th of April, 1872. On the 22nd of March, 1872, the testator entered into the agreement for partnership on which the present question has been raised. Was the gift in the articles a gift of £19,000, and if so, was it a satisfaction of the portion under the bond? Now the answer to that question

(1) 1 Bro. C. C. 555. (2) 15 Ves. 507.

must depend on the terms of the partnership deed. It is perfectly clear that by that deed the testator gave his son a share in the partnership capital, which share was to be taken at £19,000; that is to say, the effect was practically the same as if he had given him a cheque for £19,000, and the son had then brought it into the partnership. It was argued that this was not so, because the son was obliged to leave the money locked up in the partnership; but the answer to this is, that he need not have accepted the gift if he did not like; but having accepted it voluntarily, he must be taken to have accepted it as a satisfaction of the portion. [His Lordship then read the recitals of the deed as stated above, and continued:—] It appears to me clear that as between father and son *J. Lawes* the younger cannot be admitted to say that he has not received £19,000.

That would dispose of the whole matter if it were not for two cases that have been cited. The first is *Holmes* v. *Holmes* (1). It is said that that case decided that a share in stock-in-trade was not a satisfaction of a pecuniary legacy, and taking the report as it stands, it is impossible to say that it was not so decided. Still, I am not prepared to say that even a share in a stock-in-trade, if declared to be taken at a specific value, would not be a satisfaction of a portion; but I cannot discover from the report, which is very brief, what the facts really were. In that case a father by will gave his son £500 and afterwards took him into partnership, the stock being by the deed of partnership declared to be £3000, to be brought in equally by the partners, and they were to be equally entitled to the profits. It is stated that "the father brought in the whole capital, and it was understood by the whole family that he meant to give his son the half of the stock," but it is not clearly stated whether this was actually done. Nor again does it appear that the stock was actually worth as much as £3000, or what it was worth, at the time of the execution of the articles. We have not sufficient information about the circumstances to make that case a guide to us in the present case.

The other case is *Bengough* v. *Walker* (2). I agree that some of the criticisms on it made by the counsel for the Appellant were well founded, and the report is certainly not quite satisfac-

(1) 1 Bro. C. C. 555. (2) 15 Ves. 507.

C. A. 1881 *In re* LAWES. LAWES *v.* LAWES. Jessel, M.R.

tory, but I think we can find out what Sir *W. Grant* really meant. A father gave to his child a share of a mill, and directed it to be made up to the value of £10,000, and it was held that was a satisfaction of a portion of £2000. The question argued was whether a share of a mill could be a satisfaction of a legacy, because a legacy must be satisfied by something of the same kind. Then what Sir *W. Grant* says (1), after referring to some authorities, is this: "But it is to be observed that in none of those cases did the party making the advance or the bequest ever make either with reference to a definite amount to which he intended it should reach. They are all cases in which the testator without reference to the pecuniary value of the thing he was giving, has given it; and the question was, whether, as upon entering into a computation of the value of the thing given, it turned out equal to the portion or the legacy, it should be taken as a satisfaction; the testator not having indicated any idea of his own whether it was or was not correspondent in value to the debt which he owed, or the legacy he gave. Those cases, therefore, would not precisely apply." The true meaning of that is, that where a testator gives to a child a beneficial lease or share of works, or any other thing, and says nothing about the value, he is not to be taken to be giving it in satisfaction of a pecuniary bequest; but where he does refer to the value the presumption of satisfaction may arise. And when he gives it as being of larger amount than the legacy and the legatee takes it, he takes it at the estimated amount, and in that case it makes no difference whether the testator directs the thing to be sold and gives him the proceeds, or directs the thing to be taken as a specific amount. In either case he shews his intention to give a definite amount. Sir *W. Grant* says again (2): "The amount is indeed uncertain, depending upon the value of the powder concern; but the testator knowing the value of the share not to be £10,000 says he means to give in money all that the share shall fall short of such sum. If it does falls short to the amount of £7000 he meant to give £7000."

The reasons I have given are sufficient, in my opinion, for affirming the judgment of the learned Judge.

(1) 15 Ves. 512. (2) 15 Ves. 514.

LUSH, L.J.:—

I think that the judgment of Mr. Justice *Fry* is clearly right. Both parties agree that the share of the capital was in fact worth £19,000. If it had been worth £10,000 only there might have been some doubt, for the father might perhaps have had no right to impose conditions on the son's acceptance. But he gives him nearly twice as much, and it was open to the son to accept it on the conditions annexed to it, and when he accepted, it is clear that he took it in satisfaction of the bond, in the absence of any rebutting evidence. It was equivalent to the father saying, I give you £19,000 in money if you will agree to put it into the business.

LINDLEY, L.J.:—

I am of the same opinion. The only question really is whether the presumption of satisfaction arises. If it does, there is certainly nothing to rebut it. Then does it arise? The father gave a bond for payment of £10,000 in April, 1872. In March, 1872, the father and son and a third party enter into partnership, and the articles shew conclusively the nature of the arrangement which was made. The father gives his son £19,000. He gives it in money—not in cash, but in what is to be taken as so much money. There is no question as to the value of what he gives; it is to be taken by the son as that amount of cash. Then why does not the presumption of satisfaction arise? I see no reason for saying it does not.

With respect to the cases which were cited, *Holmes* v. *Holmes* (1) is very shortly reported; the effect of it is not quite clear, and I think the present case comes more within *Bengough* v. *Walker* (2). I therefore agree that the judgment of Mr. Justice *Fry* must be affirmed.

Solicitors for Appellant: *Blake & Snow.*

Solicitors for Respondents: *Surr, Gribble & Bunton; Turner & Son.*

(1) 1 Bro. C. C. 555.

(2) 15 Ves. 507.

M. W.

C. A.
1881
Dec. 3.

SHARDLOW *v.* COTTERELL.

[1880 S. 1707.]

Statute of Frauds—Agreement—Description of Property.

A house and premises were put up for sale by auction under conditions of sale which did not contain any description of what was sold, but were so expressed that it could be inferred from them that the subject of sale was real estate. *A. Shardlow* became the purchaser. After the sale the auctioneer signed and gave to him the following memorandum at the foot of the conditions: "The property duly sold to *A. Shardlow*, Butcher, *Pinxton*, and deposit paid at close of sale," and at the same time signed and gave to him the following receipt: "*Pinxton*, March 29, 1880. Received of Mr. *A. Shardlow* the sum of £21 as deposit on property purchased at £420 at *Sun Inn*, *Pinxton*, on the above date. Mr. *G. Cotterell*, owner:"—

Held, reversing the decision of *Kay*, J., that the receipt, memorandum, and conditions contained a sufficiently definite description of the property sold to enable the Court to receive parol evidence of what the property consisted, and that the *Statute of Frauds* was no defence to an action by the purchaser for specific performance.

Held, by *Jessel*, M.R., and *Baggallay*, L.J., that the receipt alone without the memorandum and conditions was a memorandum sufficient to satisfy the requirements of the statute.

THIS was an appeal by the Plaintiff from a decision of Mr. Justice *Kay* (1).

Rigby, Q.C., and *J. G. Alexander*, for the Appellant:—

If in a contract there is a reference to property in such a way that the subject-matter can be rendered certain by extrinsic evidence, that is sufficient. The whole frame of the conditions shews that some real estate was the subject of sale, and the question is merely of parcel or no parcel; it is impossible ever to describe property in such a way as wholly to dispense with parol evidence. In *Macdonald* v. *Longbottom* (2) "your wool" was held a sufficient description; in *Ogilvie* v. *Foljambe* (3) "Mr. *Ogilvie's* house," and in *Wood* v. *Scarth* (4) "the premises." There is no uncertainty, the only question is, What property was put up for sale at a certain time? A description which would be sufficient in a will must

(1) 18 Ch. D. 280.
(2) 1 E. & E. 977.
(3) 3 Mer. 53.
(4) 2 K. & J. 33.

be sufficient in a contract, and a devise of "the property which I bought from Mr. *Cotterell* at the *Sun Inn* on the 29th of March, 1880," would certainly be a good devise.

Whitehorne, Q.C., and *Fooks*, *contrà*:—

This is a patent ambiguity, and parol evidence is not admissible to explain it: *Dart's* Vendors and Purchasers (1). The word "property" is of the vaguest description, and defines nothing. We do not dispute that, as in *Long* v. *Millar* (2), parol evidence is always admissible to shew to what property a description applies, but it cannot be called in to make a description where there is none. As regards the case of a devise, the Courts have always shewn more liberality to wills than to contracts: *Williams* v. *Lake* (3).

[LUSH, L.J., referred to *Ridgway* v. *Wharton* (4).]

That establishes only that, if a document is referred to, parol evidence is admissible to shew what document is referred to, and *Cave* v. *Hastings* (5) so explains it. To make this case come within *Long* v. *Millar* there is required some description in the particulars of sale.

[JESSEL, M.R.:—The memorandum is not in form a complete contract; no price is named. Does not *Long* v. *Millar* authorize us to join the several documents? Suppose a memorandum in this form: "I agree to buy for £450 the property which was put up for sale at the *Sun Inn* on the 29th day of March, 1880, by Mr. *Cotterell*, and which was not then sold." Would not that be enough?]

In that case there would be a description. *Blagden* v. *Bradbear* (6) decides the point which arises here: it was held that the receipt could not be connected with the conditions of sale. The principles applicable to the case are illustrated by *Sale* v. *Lambert* (7); *Potter* v. *Duffield* (8); *Rossiter* v. *Miller* (9); *Sugden's* Vendors and Purchasers (10).

(1) 4th Ed. p. 882.
(2) 4 C. P. D. 450.
(3) 2 E. & E. 349.
(4) 6 H. L. C. 238, 257.
(5) 7 Q. B. D. 125.
(6) 12 Ves. 466.
(7) Law Rep. 18 Eq. 1.
(8) Law Rep. 18 Eq. 4.
(9) 3 App. Cas. 1124.
(10) 14th Ed. p. 136.

C. A. 1881 SHARDLOW v. COTTERELL.

[BAGGALLAY, L.J., referred to *Bleakley* v. *Smith* (1).]

Suppose the conditions and memorandum turned into a formal document, we should have nothing but "property" as a description, and how can that be held to satisfy the statute; it is a mere reference to a verbal agreement to sell. In *Monro* v. *Taylor* (2) it was taken for granted that there must be some description. In *Price* v. *Griffith* (3) the description was "coals, &c.," which is not nearly so vague as "property," but yet was held insufficient. In *Caddick* v. *Skidmore* (4) a better description than we have here was held insufficient. As regards the analogy of a devise, this is like a devise to *A. B.* of "all that property which I verbally promised yesterday to leave to him;" and that, we submit, would not be valid.

JESSEL, M.R.:—

This case has been argued at some length, but I cannot bring my mind to doubt as to the sufficiency of the description. The case is a short one, and a very remarkable one, as illustrating our law. The Plaintiff bought by auction a house at the *Sun Inn, Pinxton*, on the 29th of March, 1880, and paid his deposit, for which the auctioneer gave him a receipt in these terms:—"Received of Mr. *A. Shardlow* the sum of £21 as deposit on property purchased at £420 at *Sun Inn, Pinxton*, on the above date. Mr. *George Cotterell, Pinxton*, owner." It has not been contested that if the receipt had said "on a house purchased" there would have been a sufficient description, but it has been argued that because the word "property" is used the description is insufficient, and Mr. Justice *Kay* has so decided. There were conditions of sale containing no description of the property, but headed "Property sale at *Sun Inn, Pinxton*, March 29th, 1880." At the bottom was the following memorandum, signed by the auctioneer: "The property duly sold to Mr. *Arthur Shardlow*, butcher, *Pinxton*, and deposit paid at close of sale." It was held by the learned Judge in the Court below, and I think rightly held, that having regard to the word "purchased" in the receipt,

(1) 11 Sim. 150.
(2) 8 Hare, 51.
(3) 1 D. M. & G. 80.
(4) 2 De G. & J. 52.

there was sufficient connection between the two documents to allow them to be read together as saying what was sold, but he came to the conclusion that even taking them together there was not a sufficient description to satisfy the requirements of the *Statute of Frauds*. Now, I am of opinion that the receipt alone contained a sufficient description, and when we read the two documents together, which I agree with the learned Judge in the Court below in saying that we are at liberty to do, the case of the purchaser is greatly strengthened.

Now, what is necessary to make a binding contract within the *Statute of Frauds?* In considering this it is well to go back to the statute, because the decisions sometimes gradually drift away (so to speak) from the statute, and if we rely on them alone we are likely to be misled. The *Statute of Frauds*, 29 Car. 2, c. 3, enacts by sect. 5 that all devises of land shall be in writing, and signed by the party devising the same, or by some other person in his presence and by his express directions. The 4th section provides that no action shall be brought upon any contract or sale of lands, or any interest in or concerning them, unless the agreement on which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed as therein mentioned. There appears to me to be no distinction between these two sections as to the description required, and a decision as to what is a sufficient description in the one case must be an authority as to what shall be a sufficient description in the other case. What, then, is a sufficient description in writing? No one can say beforehand. You cannot have a description in writing which will shut out all controversy as to parcels, even with the help of a map. I have known a most bitter and long-continued litigation in a case where both sides had most beautiful maps, the contest being between two neighbouring proprietors as to the ownership of a ditch. No description can be framed that will prevent all dispute, and the framers of the *Statute of Frauds* knew very well that they could not prevent perjury altogether, but could only go some way towards it; and it was considered that to require a note in writing was a useful check. It could be nothing more: it could not entirely prevent perjury, for parties may suborn witnesses to swear to the existence, destruction, and contents of a memorandum

C. A. 1881 SHARDLOW v. COTTERELL. Jessel, M.R.

which never in fact existed. Looking at the statute in that light, what is a sufficient description? I consider that any two specific terms are enough to point out sufficiently what is sold. For instance, "the estate of *A. B.* in the county of *C.*," or "the estate of *A. B.* which he bought of *C. D.*," or "the estate of *A. B.* which was devised to him by *C. D.*," would be sufficiently specific. If so, why should not "the property which *A. B.* bought of *C. D.* on the 29th of March, 1880," be sufficient? Would anybody doubt that in a will "the property which I bought of *C. D.* on the 29th of March, 1880," would be a sufficient description? If it is so in a will why not in a contract? I am at a loss to understand the reasoning on which the learned Judge in the Court below proceeded.

Let us look at the words in the present case. "Property purchased at £420 at the *Sun Inn, Pinxton*, on the above date" (that is the 29th of March, 1880), "Mr. *George Cotterell, Pinxton*, owner." There are here not two, but three specific terms, that on a given day it was sold at a given place, and that it belonged to Mr. *George Cotterell*. It appears to me that this is an amply sufficient description. True there may be a dispute about what the property was, but so there always may be. It is admitted that the word "house" would have been sufficient, but that term would no more have excluded a dispute than the word "property." I am of opinion, therefore, that the receipt alone contains enough to determine what the thing sold was. When we come to look at the conditions of sale we find a good deal more. [His Lordship then made observations to the effect that the conditions though not expressly shewing that the subject of the sale was real estate contained indications that it was.] Then we have at the foot the memorandum, "The property duly sold to Mr. *A. Shardlow*, butcher, and deposit paid at close of sale." It therefore appears to me there is sufficient description of the property, and with great deference to the learned Judge in the Court below I think his reasons for coming to the contrary conclusion not sufficient. He says that to his mind the word "property" is quite as vague as the word "vendor." In this I cannot agree with him. It is, he says, because of the vagueness of the word that he does not allow parol evidence to be introduced to shew what the thing sold was.

The learned Judge seems to have forgotten that the word "property" is the word used in the statutory form of conveyance by a debtor for the benefit of his creditors. No one ever doubted that the statutory form was valid, for "property" is sufficiently definite when you mention all the property of the man, though parol evidence is necessary to shew what it was. There is no rule requiring an inseparable incident as part of the description; a separable incident is quite sufficient. Has anybody ever doubted that "all that farm formerly in the tenancy of *A.*, which was devised by *B.* to *C.*," is a sufficient description, even though the farm was not mentioned in the will, and passed as part of the residue. Then those of us who are old enough to remember common recoveries, may remember the form in the grant to make a tenant to the *præcipe*, "All the lands, tenements, hereditaments, estate whatsoever of which *A. B.* is tenant for life," &c. This required extrinsic evidence to shew what the properties were, but no one ever doubted that it passed all the lands of which *A. B.* was tenant for life. The learned Judge says (1), "Suppose for example the vendor were to say, 'I sold at the *Sun Inn* a certain house, certain plant, certain loose materials upon the ground, and I say what I sold were all these things,' and he gives a list. Suppose the purchaser says, 'I did not buy these things, I did not buy so many,' or 'I bought those things and something else:' is not that the danger which the *Statute of Frauds* was intended to prevent?" Suppose these words put into a will, "I leave all the property which I bought of *George Cotterell* on the 29th of March, 1880, to *John Smith*." Would the learned Judge say that *John Smith* would not take the property then bought? There may be a contest as to what belonged to Mr. *George Cotterell*, and when the learned Judge goes on to say, "You must have on the face of the contract a sufficient definite description of the things sold to enable you to introduce parol evidence to shew what the articles were to which that description refers," I agree with him, but when he further says that "a mere description of the thing sold as 'property' is not to my mind sufficiently definite to enable any such parol evidence to be adduced," I think that he makes a remark not applicable to the present case, because he takes the

(1) 18 Ch. D. 293.

C. A. 1881 SHARDLOW v. COTTERELL. Jessel, M.R.

word "property" alone, whereas the description is in fact "property of which Mr. *George Cotterell* is owner, and which was sold on March the 29th, 1880," and that to my mind is a sufficiently definite description. In this particular instance there was only one property which Mr. *Cotterell* put up on that day for auction, and which was the house in question, and I think for the reasons I have given that the judgment of the Court below must be reversed, and that this appeal must be allowed.

BAGGALLAY, L.J.:—

I also agree in thinking that the receipt was a sufficient memorandum to satisfy the requirements of the *Statute of Frauds*. If we look at that document we find the name of the vendor, the name of the purchaser, the price, and the signature of an agent who signed on behalf of the vendor, but it is argued that it is too indefinite as regards the description of the property, which is merely described as "property purchased at £420 at *Sun Inn, Pinxton*, on the above date." In *Dart's* Vendors and Purchasers (1), it is laid down that "a general description of the estate is sufficient if parol evidence can be produced to shew what property was intended," and he refers to *Ogilvie* v. *Foljambe* (2), in which the description of "Mr. *Ogilvie's* house" was held to be sufficient, and *Bleakley* v. *Smith* (3), where it was held that the "property in *Cable Street*" was a sufficient description. Lord *St. Leonards* (4) lays down the rule in the same way. I see no difficulty in applying that doctrine here, and in my opinion the receipt alone contains a sufficient description. But, as has been pointed out by the Master of the Rolls, the receipt and the conditions with the memorandum at their foot may be read together, as the learned Judge in the Court below held, and so reading them we have evidence that there was a sale by auction under conditions of sale which indicate that what was sold was real property, and I think that the two documents together are more than sufficient to furnish a description. I do not assent to the proposition that letters only can be read together. I take it that any documents, whether letters or not, one of which refers to the

(1) 5th Ed. p. 219.
(2) 3 Mer. 53.
(3) 11 Sim. 150.
(4) Sug. V. & P. 14th Ed. p. 134.

other, can be read together, and the authority of *Long* v. *Millar* (1) was hardly required in support of that proposition.

LUSH, L.J.:—

I regard this case as one of considerable importance. The question presented to us is whether the two papers taken together, the receipt and the conditions of sale with the memorandum at the foot of the conditions of sale, contain the essentials of a perfect contract. Now in these two documents we have first the name of the buyer and the name of the seller, we have the price to be paid, and the time when the bargain is to be completed, but it is objected that there is no sufficient description of the thing sold. The argument is that the word "property" is a term used for all kinds of chattel property as well as real estate, and that here we cannot tell whether it be one or the other. But on the face of the documents it is clear that it is property that can only pass by conveyance, because the expenses of the transfer are to be paid by the purchaser. There is no transfer if you buy a horse or anything of that kind. Therefore it is property which requires a conveyance. Then the day is fixed on which possession is to be given up, and this points not to the sale of horses or anything of that kind, but to the sale of real property. I therefore come to the conclusion that a reasonable interpretation of the word "property" in these documents is "real property." If this is so, we have the nature of the property, the name of the seller, the name of the buyer, the price to be paid, and the time when the purchase is to be completed, but it is urged that the property is not described with sufficient certainty. I have been for a long time puzzling myself to know what can be the meaning of this objection. Suppose a horse-dealer having a great number of horses offers one of them for sale; the horse is trotted out and approved of, but the parties differ about the price. Suppose the next day the seller writes and says, "I will let you have that horse for £50," and the buyer writes to accept the offer, would not parol evidence be admissible to shew what horse was meant? Or suppose a landowner were to write to another, "I will sell you all my property in *Regent Street* for £10,000," and the other writes to accept the offer, could it be

(1) 4 C. P. D. 450.

C. A. 1881 SHARDLOW v. COTTERELL. Lush, L.J.

argued that this was a void contract because the number of the houses was not specified? The ordinary form of a conveyance by the debtor for the benefit of his creditors has been already referred to as shewing what a general description is sufficient.

The learned Judge in the Court below reasons on the case of *Ogilvie* v. *Foljambe* (1). That was a contract by which "Mr. *Ogilvie's* house," with all the fixtures, was to be bought for £14,000. The objection was taken that there was no certain description of the property. The Master of the Rolls said (2), "The defendant speaks of 'Mr. *Ogilvie's* house,' and agrees 'to give £14,000 for the premises,' and parol evidence has always been admitted in such a case to shew to what house and to what premises the treaty related." This has always been considered a leading authority. The learned Judge attempts to distinguish that case by reference to the previous correspondence which had taken place between the parties, but the Master of the Rolls does not put his decision on that ground. In the present case we have "property purchased at £420 at *Sun Inn, Pinxton*, on the 29th of March, 1880," real property, which was knocked down to the Plaintiff as the highest bidder for £420. Yet the learned Judge, after stating that in *Ogilvie* v. *Foljambe* there was a description of specific property, goes on to say, "I have not got anything like that here. I have no description; I do not know on the face of the contract, or by anything I am entitled to look at, whether it was real or personal estate, or partly one and partly the other, and I have nothing except the vague description 'property,' and that it belonged to Mr. *Cotterell* the owner." So that the learned Judge overlooked the conditions of sale which, to my mind, shew clearly that the property was real estate. Then in the concluding part of the judgment he says that he is not prepared to carry the law on this subject one hair's breadth beyond the decided cases, and that he thinks he should be doing so if he held the description in the present case to be sufficient. I cannot help thinking that this conclusion is opposed to legal principle. The general rule is, "*Id certum est quod certum reddi potest*," and I am of opinion that this maxim applies here. In *Ogilvie* v. *Foljambe* parol evidence was wanted just as much as here to shew what was the subject-

(1) 3 Mer. 53. (2) 3 Mer. 61.

matter of the contract, and the judgment below, if carried to its legitimate results, would establish that no contract can be good within the statute unless it describes the property in such a way that it is wholly unnecessary to resort to parol evidence.

Solicitors: *Berry & Binns; Stevens & Co.*

H. C. J.

SOTHERAN *v.* DENING.

[1880 S. 0760.]

Power—Testamentary Appointment—Revocation by General Clause in subsequent Will.

A general clause in a will revoking all former wills revokes a prior testamentary appointment.

In the Goods of Merritt (1) and *In the Goods of Joys* (2) considered.

A married woman having a general power of appointment by will over real estate executed a will appointing the estate. After the death of her husband, she made another will revoking all former wills and containing a general devise and bequest of all her real and personal estate. She afterwards made a third will, also revoking all former wills, and bequeathing her personal estate, but not devising or appointing her real estate. She had no real estate except that subject to her power of appointment:—

Held (affirming the decision of the Master of the Rolls), that the testamentary appointment under the first will was revoked by the second will, and the second will by the third, and that the real estate went as in default of appointment.

By an indenture of settlement dated the 27th of April, 1870, and made between *Thomas Hooper* and *Catherine Hooper* his wife, of the one part, and *William Edward James* (since deceased) and the Plaintiff *Henry Sotheran*, of the other part, and duly acknowledged by the said *Catherine Hooper*, the moiety belonging to the said *Catherine Hooper* of a certain freehold farm in the county of *Monmouth* was conveyed by the said *Thomas Hooper* and *Catherine Hooper* (subject to any estate the said *T. Hooper* might have as tenant by the curtesy) unto and to the use of the said *W. E. James* and *H. Sotheran*, upon trust for the said *Catherine Hooper* during her life for her separate use, with remainder in trust for such

(1) 1 Sw. & Tr. 112. (2) 4 Sw. & Tr. 214.

C. A. 1881 SOTHERAN v. DENING.

persons or person and in such manner as she should (whether covert or sole) by will appoint: with remainder, in default of appointment, in trust for *Emma Dening*, then the wife of the Defendant *Thomas Dening*, for her separate use absolutely, and her heirs and assigns for ever.

Catherine Hooper, by a will and testamentary appointment, dated the 22nd of December, 1871, after reciting the settlement, in exercise of the power therein contained appointed the said moiety, subject to her life interest, to the Plaintiff absolutely.

Thomas Hooper died in 1877.

After his death, his widow *Catherine Hooper* made a second will, dated the 15th of August, 1877, commencing, "This is the last will and testament of me, *Catherine Hooper*, of, &c., widow, I revoke all former wills." Then, after directing payment of her debts, and funeral and testamentary expenses, she proceeded: "All my real and personal estate and effects I give and bequeath" to trustees upon trust to convert the personal estate and invest the proceeds as therein mentioned: "And I declare that the said trustees or trustee shall stand seised and possessed of all and singular my said real and personal estate for the benefit of *Geraldine Catherine Anne Dening*," the only child of the testatrix's daughter, the said *Emma Dening*, until she should attain twenty-one or marry, whichever should first happen, and upon her attaining twenty-one or her marriage, "then upon trust to convey and assign all and singular my said real and personal estate unto the said *Geraldine Catherine Anne Dening* for her absolute but sole and separate use."

Catherine Hooper made a third will, dated the 22nd of January, 1878, commencing, "This is the last will and testament of me, *Catherine Hooper*, of, &c., widow. I give and bequeath all my personal estate unto *George Nelson Emmet* the younger," upon trust to convert the same into money, and after payment of her debts and funeral and testamentary expenses to invest the same as therein mentioned, and out of the income to pay to her granddaughter, the said *Geraldine C. A. Dening*, an annuity of £50 for her maintenance and education: and from and after she should attain twenty-one or her death, whichever event should first happen, "I direct my said trustee to pay, assign, and transfer the

whole of my said personal estate to the eldest son of my nephew *Henry Sotheran*, his executors, administrators, and assigns absolutely." Then, after a power for the appointment of new trustees, the testatrix concluded as follows: "I appoint the said *George Nelson Emmet* the younger, executor of this my will, and, hereby revoking all former or other wills, I declare this to be my last will and testament."

Catherine Hooper died on the 27th of March, 1880.

Emma Dening had died in 1872, having by her will, dated in 1869, devised and bequeathed all her real and personal estate to her husband, the Defendant *Thomas Dening*, absolutely.

The object of this action was to ascertain who, having regard to *Catherine Hooper's* three wills, was the person now entitled to the moiety comprised in the settlement of the 27th of April, 1870.

It was contended by the Defendant *Thomas Dening* as his wife's devisee, that *Catherine Hooper's* first will, or testamentary appointment of the 22nd of December, 1871, was revoked by her third will of the 22nd of January, 1878; and that as such third will contained no appointment or devise of real estate, the general testamentary power of appointment given to her by the settlement had not been exercised, and, accordingly, that the limitation in default of appointment took effect.

On the other hand, it was contended by the Defendant *Geraldine C. A. Dening*, the devisee under the second will, of the 15th of August, 1877, that the first will was revoked by the second, and that the second operated as an execution of the general testamentary power of appointment, and was not revoked by the third.

The contention of the Plaintiff *Henry Sotheran*, the devisee or appointee under the first will, was that the appointment made thereunder had not been revoked or affected by the subsequent wills.

In order to have these various questions decided, this action was brought by the Plaintiff *Henry Sotheran*, against *Thomas Dening* and *Geraldine C. A. Dening*, who was still an infant, claiming a declaration that the appointment made by the first will was not revoked or affected by either the second or the third, and that he was accordingly absolutely entitled to the moiety in question, and

C. A. 1881

SOTHERAN v. DENING.

to have the rights and interests of all persons in such moiety ascertained and declared.

In the course of the argument it was stated and admitted that the testatrix, *Catherine Hooper*, had no real estate subject to her disposal except this moiety.

The action was heard before the Master of the Rolls on the 21st of February, 1881.

Chitty, Q.C., and *Nalder*, for the Plaintiff, cited *In the Goods of Merritt* (1); *In the Goods of Joys* (2); *Freeman* v. *Freeman* (3); *In the Goods of Meredith* (4); *Thomas* v. *Jones* (5); *Wills Act* (1 Vict. c. 26), s. 27; *Sugden* on Powers (6).

Nugent, for the Defendant *Thomas Dening*, was not called upon, but cited *In the Goods of Sinclair* (7).

Joshua Williams, Q.C., and *T. A. Roberts*, for the Defendant *Geraldine C. A. Dening*, cited *In the Goods of Merritt; In the Goods of Joys; Denny* v. *Barton* (8); *Gladstone* v. *Tempest* (9); *Evans* v. *Evans* (10); *Hughes* v. *Turner* (11); *Williams* on Executors (12).

[JESSEL, M.R., referred to *Branchley* v. *Lynn* (13).]

JESSEL, M.R.:—

The question I have to decide is as to the title of the Plaintiff to this moiety, and I must say I feel no doubt whatever as to what is the effect, so far as the title of the Plaintiff is concerned, of that which the testatrix has done. What she has done is this. Under a settlement she has a general testamentary power of appointment over a moiety of certain real estate; and accordingly by will she, being at the time a married woman, exercises that power by appointing the moiety to the Plaintiff absolutely. Then

(1) 1 Sw. & Tr. 112.
(2) 4 Sw. & Tr. 214.
(3) 5 D. M. & G. 704.
(4) 29 L. J. (Pro.) 155.
(5) 2 J. & H. 475, 480.
(6) 8th Ed. p. 458.
(7) 3 Curt. 746; 7 Jur. (O.S.) 803.
(8) 2 Phillim. 575.
(9) 2 Curt. 650.
(10) 23 Beav. 1.
(11) 4 Hagg. 52.
(12) 8th Ed. pp. 170, 179.
(13) 2 Robert. 441.

she becomes a widow and makes a second will as follows: first she says, "I revoke all former wills." That must have reference to the first will, and nothing else, for there was no other will but the first. Then she goes on, "all my real and personal estate and effects I give and bequeath" to trustees, upon trust to convert the personal estate and invest the proceeds: "And I declare that the said trustees or trustee shall stand seised and possessed of all and singular my said real and personal estate for the benefit of *Geraldine Catherine Ann Dening*" (the granddaughter of testatrix) until she attains twenty-one or marries; and upon her attaining twenty-one or marrying, then upon trust for her absolutely.

Now I have no hesitation in saying that this is a complete revocation of the prior testamentary appointment. First the testatrix revokes all former wills. The testamentary appointment was a will, and the revocation is coupled in this case with a disposition of all her real and personal estate. It is admitted that she had no real estate except that over which she had a power of appointment, and the *Wills Act* says (sect. 27) that a general disposition by will shall operate as an exercise of a general power of appointment. Consequently, the second will actually gives the property comprised in the first will to some one else. I am of opinion that the question is beyond fair argument, and, looking both at the words of revocation and the words of disposition, that the testatrix did not intend the prior appointment to take effect.

Then it is said you can get rid of the words of the second will, because that will contains no reference to the former will; and in support of that argument certain cases before Sir *Cresswell Cresswell* are cited as authorities. But those cases, which seem to have followed some old ecclesiastical decisions, are clearly different from the case before me, as far as the second will is concerned, and do not affect this case in the least. It is therefore clear to my mind that the Plaintiff has no title.

Now I come to the second question. Has the Defendant, *Geraldine Catherine Ann Dening*, the general devisee and legatee under the second will, a title? It appears that the testatrix made a third will in January, 1878, commencing thus: "This is the last will and testament of me, *Catherine Hooper*." Then she says,

C. A. 1881 SOTHERAN v. DENING. Jessel, M.R.

"I give and bequeath all my personal estate unto *George Nelson Emmet*, the younger," upon trust for conversion and investment, and out of the income to pay to her said granddaughter, *Geraldine Catherine Ann Dening*, an annuity of £50 until she attained twenty-one; and on her attaining twenty-one or dying, whichever should first happen, "I direct my said trustee to pay, assign, and transfer the whole of my said personal estate to the eldest son of my nephew, *Henry Sotheran*, his executors, administrators, and assigns absolutely." Then she winds up as follows: "I appoint the said *George Nelson Emmet*, the younger, executor of this my will, and hereby revoking all former or other wills, I declare this to be my last will and testament."

The first question that arises on this will is, did it revoke the former wills entirely? The testatrix had made two previous wills, the second of which also contained a revocatory clause. First it is said that this third will does not revoke "all former or other wills," because it does not contain a complete disposition of her property, since it disposes of her personal estate only. But that is, to my mind, a novel doctrine. You can revoke a prior will without making any disposition at all; in fact, the words of revocation are put in for the express purpose. Conveyancers put them in to get rid of all former wills altogether: they would be absolutely useless on the theory that they do not amount to a complete revocation. So well was this known, that the revocatory clause was retained in wills even after the passing of the *Wills Act* which expressly recognised the fact that the execution of another will was sufficient to revoke a former will. Sect. 20 says, "that no will or codicil or any part thereof shall be revoked otherwise than as aforesaid:" that is, by marriage, "or by another will or codicil executed in manner hereinbefore required." But the Legislature knew perfectly well that the execution of another will or codicil was not the only thing necessary to effect a revocation of a former will, for the section proceeds, "or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed." So that the Act refers to that which was perfectly well-known to lawyers before—that you might revoke a will by a writing properly attested containing no disposition whatever; *à*

fortiori by a writing properly attested containing, not only an express revocation, but also a fresh disposition of property, even though a partial disposition only.

In my opinion, it is plain that a revocation, when it is clear in words, has the effect of revoking all former wills just as if they had never existed: it must be considered as leaving no operation whatever to any former will. There can be no doubt whatever that, prior to the *Wills Act*, a devise of real estate, such as that contained in the will of the 15th of August, 1877, would have been revoked by a subsequent will containing a revocatory clause similar to that contained in the will of the 22nd of January, 1878. By the new Act, all the real estate of the testatrix, including that over which she had a general testamentary power of appointment, would have passed under the will of August, 1877, had it stood alone; but, in my opinion, it did not pass, because that will was revoked by the subsequent will of January, 1878, that is to say, the old law is not affected to this extent by the *Wills Act*.

But it is said that the *Wills Act* cuts down the effect of a general clause of revocation, and that to effect a revocation of a former will an intention to revoke must be shewn by reference to that will, and there was great ingenuity in Mr. *Williams*' argument on this point; but the Act does not destroy the effect of a will which operates as an execution of a power. In the two cases to which he referred, *In the Goods of Merritt* (1) and *In the Goods of Joys* (2), it was held that, where a specific appointment was made by will under a power in a settlement to *A.*, and then there was an appointment by another will under a power in another settlement to *B.*, and the second will contained a general revocatory clause, the second will did not revoke the first, and that the first was entitled to probate; the second will being confined to the exercise of the power of appointment under the second settlement; it being held that a mere revocation of "all former wills" had no reference to the property the subject of the power under the first settlement. That is to say, according to these authorities, a general revocatory clause does not operate as a revocation of a prior will made under a power, because it does not refer either to the power or to the property the subject of the

(1) 1 Sw. & Tr. 112. (2) 4 Sw. & Tr. 214.

C. A. 1881 SOTHERAN v. DENING. Jessel, M.R.

power. Supposing a testator says, in so many words, "I hereby exercise all powers vested in me," that is a good revocation of a prior testamentary appointment, and will operate as a complete revocation of the instrument. It appears to me that the doctrine referred to by Sir *Cresswell Cresswell* did not affect the question he had to decide.

Then it is said, on the part of the Plaintiff, that the second will could not have operated as an exercise of the power, because the first will was a specific appointment of particular property, and the second will contained only a general devise. I will now turn to the 27th section of the Act, which says that a general devise of the real estate of the testator shall be construed to include "any real estate which he may have power to appoint in any manner he may think proper;" then it says, "and shall operate as an execution of such power." These latter words are really superfluous, for under the former words alone, without reference to the latter, a general devise will operate as an appointment under a general power.

The effect of the section is that property over which the testator has a general power of appointment is to be treated as his own property and passing as such under a general devise; so that the general devise in this second will was capable of operating as an exercise of the power. But when you revoke the will itself there is no devise upon which it can operate. The Act only operates as an extension of a general devise. It only says that a general devise of real estate shall operate also as an exercise of a general power of appointment. But supposing you destroy the will, or revoke it, how can it operate on anything at all? The destruction or revocation of the will means that the general devise, including, as it does, the exercise of the power, shall no longer have any operation at all.

I am, therefore, of opinion that the first will is revoked by the second, and the second by the third; and, accordingly, that the moiety in question remains unappointed and goes as in default of appointment.

G. I. F. C.

C. A. From this decision the Plaintiff appealed. The Defendant *Geraldine C. A. Dening* did not appeal.

The appeal was heard on the 7th of December, 1881.

Rigby, Q.C., and *Nalder*, for the Appellant:—

The first will is unaffected by either of the others. A general clause of revocation in a will does not revoke a testamentary appointment contained in a previous will unless there is a special reference to it, or some other evidence of intention to revoke it. This was distinctly laid down by Sir *Cresswell Cresswell* in *In the Goods of Merritt* (1) and *In the Goods of Joys* (2). The Master of the Rolls held that the general devise contained in the second will was in itself sufficient to revoke the previous appointment; but that is stretching too far the meaning of the 27th section of the *Wills Act*, which is only intended to avoid an intestacy. It is not intended that a general devise should be such an exercise of a power as to revoke a previous appointment: *Thomas* v. *Jones* (3); *Freeman* v. *Freeman* (4). The second will having been itself revoked could have no effect in revoking the first; the whole question, therefore, depends upon the operation of the third will: *Williams* on Executors (5).

Davey, Q.C., and *Nugent*, for the Defendant, *Thomas Dening*, were not called on.

COLERIDGE, C.J.:—

I am of opinion that the Master of the Rolls was right in his decision, and for the reasons given by him. The first question is whether the will of 1871 was revoked by the will of 1877. In that year Mrs. *Hooper*, after she was a widow, and having full power to deal with her real and personal estate, makes a will in which she revokes all former wills. It is clear that that revocation was not the less a revocation of the will of 1871, because that will was made under a power. Besides, there is this strong circumstance, that she not only revokes former wills, but she gives and bequeaths all her real and personal estate. That passes all which she had power to dispose of. Therefore I have no hesitation in saying that this will was revoked by the will of 1871.

(1) 1 Sw. & Tr. 112.
(2) 4 Sw. & Tr. 214.
(3) 2 J. & H. 475, 480.
(4) 5 D. M. & G. 704.
(5) 8th Ed. pp. 180, 181.

C. A. 1881 SOTHERAN v. DENING.

Then as to the third will, namely, the will of 1878, that also revoked all former wills. And in the face of the 22nd section of the *Wills Act* it cannot be contended that by revoking the will of 1877 it set up again the will of 1871. Therefore it follows that both the former wills are revoked, and the real estate goes in default of appointment.

BAGGALLAY, L.J.:—

I am of the same opinion. It has been decided that a general revocation of wills does not necessarily revoke an appointment by will. That view is adopted by Sir *C. Cresswell* in the two cases referred to. But it must be shewn that it is entirely unreasonable that it should have that effect, otherwise it will be a revocation. Here it is clear that the testatrix intended that the revocation should have the effect of revoking the appointment, for it is followed by a gift of all her real and personal estate, which would include the property subject to the power.

It is also quite clear that the 22nd section of the *Wills Act* excludes the suggestion that the revocation of the second will set up the first again.

LINDLEY, L.J.:—

I am of the same opinion. The first question is, was the first will revoked? It came into operation under the power; the appointment was to be by will. It is a declaration of use, but it is also a will. Therefore that it is revoked by the will of 1871 is clear. The only other question is whether the will of 1878 while it revokes the will of 1877 sets up again the will of 1871. That question is concluded by the 22nd section of the *Wills Act*.

The appeal must therefore be dismissed.

Solicitors: *Emmet & Son; J. W. Smith.*

M. W.

In re CROSS.
HARSTON *v.* TENISON.

[1880 C. 0654.]

C. A.
1881
FRY, J.
Nov. 14, 15.
C. A.
1881
Dec. 19.
1882
Jan. 16.

Trustee and Cestui que Trust—Breach of Trust—Waiver—Stale Demand.

A *cestui que trust* who with knowledge that his trustee has committed a breach of trust obtains from him a part only of that to which he is entitled, does not thereby waive his right to such further relief as he may be able to obtain unless an intention so to do can be clearly inferred from the surrounding circumstances.

In November, 1860, an order was made in a suit for administering the trusts of the will of *J. C.*, to which *H. C.*, a former trustee, was Defendant, directing her to pay into Court a sum of money in respect of breaches of trust committed in 1843 and 1845, the amount of which had been ascertained by the Chief Clerk in the suit. *H. C.* went abroad, and substituted service of the order was made upon her. By the order on further consideration in 1863, *H. C.* appearing by counsel, certain sums of money to which she was entitled, and her life interest under the testator's will, were ordered to be impounded and paid over to "the account of *H. C.* funds applicable for the repayment of trust funds misappropriated," and an inquiry was directed as to what steps should be taken to obtain restitution of the funds. Certain other orders were made in the suit, but no personal order was made on *H. C.* for payment of the amount of her defalcation, nor any steps taken against her, although she returned to *England* in 1870, where she remained till her death in 1880, and her residence was known to the then trustees of the will and some of the *cestuis que trust.* On her death the surviving trustee of the will of *J. C.* brought this action against her executors, claiming the administration of her real and personal estate on behalf of himself and all other the creditors, alleging himself a creditor in respect of the unpaid balance of the sum representing the breach of trust.

At the date of the institution of the action several beneficiaries under *J. C.'s* will were infants:—

Held (reversing the decision of *Fry*, J.), that the action was not an attempt to enforce a stale demand, and that the *cestuis que trust* must not be taken to have elected to abandon their claim against her and to rest content with impounding her life interest:

That, there being a debt due from *H. C.* at her death to the estate of *J. C.*, and the trusts of his will not being completed, the surviving trustee was the proper person to bring the action, and that the *cestuis que trust* need not be parties:

Although as between the *cestui que trust* and a stranger the claim of the *cestui que trust* is barred by lapse of time operating against his trustee, lapse of time is no bar as between *cestui que trust* and trustee.

THIS action was brought on the 14th of May, 1880, by the surviving trustee of the will of one *John Cross*, who died on the 23rd

C. A. 1882 — *In re* Cross. — Harston v. Tenison.

of January, 1836, against the executors and trustees of *Hannah Cross*, a daughter of the testator, who died in April, 1880. The Plaintiff claimed administration of her real and personal estate on behalf of himself and her other creditors, alleging himself to be a creditor in respect of a breach of trust committed by her, she having been one of the executors and trustees of her father's will, her brother, *John Berryhill Cross*, having been the other. By the testator's will, dated the 10th of September, 1835, and proved on the 7th of March, 1836, each of his daughters took a life interest in a sum of £1200 3½ per Cent. Annuities, which was directed to be set apart for the purpose, and benefits were given to all the issue of each of his sons who should be living at the death of the sons respectively. Several sons and daughters of the testator survived him besides *J. B. Cross* and *Hannah Cross*.

In 1856 the Plaintiff and one *C. F. Maltby* (since deceased) were appointed by the Court trustees of the will in place of *J. B. Cross* and *Hannah Cross*, and an order was made vesting in them the right to sue for *choses in action* subject to the trusts of the will. While *Hannah Cross* was acting as a trustee in the years 1843 and 1845 she committed a breach of trust by concurring with her brother in selling a sum of £4100 3½ per Cent. Stock, which formed part of the estate, and allowing him to receive the proceeds of sale, which he afterwards applied to his own purposes. On the 18th of February, 1850, *J. B. Cross* became a bankrupt. This bankruptcy was referred to in the proceedings in *Cross* v. *Maltby* as "the first bankruptcy" of *J. B. Cross*. On the 4th of February, 1858, some of the persons beneficially interested in the estate instituted in the Court of Chancery a suit of *Cross* v. *Maltby*, to which *J. B. Cross* and *Hannah Cross* were made Defendants, for the administration of the trusts of the testator's will. The bill charged the Defendants with the breaches of trust, and prayed (among other things) that an inquiry might be made as to what was due to the trust estate from the Defendants, and that they might be decreed to make good the amount of the breaches of trust. In May, 1859, a decree for the administration of the trusts was made, and an inquiry was directed as to the breaches of trust. The Chief Clerk by his certificate, filed on the 20th of July, 1860, found that the above-mentioned

breach of trust had been committed, and on the 15th of November, 1860, an order was made that *Hannah Cross* should within six months transfer into Court £4100 New 3 per Cent. Stock, the 3½ per Cents having in the meantime been converted into New 3 per Cent. Stock. As *Hannah Cross* could not be found for the purpose of serving this order upon her, an order was made on the 26th of April, 1861, for substituted service of it upon her, and the order so served, but she never obeyed it. Process of contempt was issued against her, which she avoided by leaving *England*. She remained abroad until 1870, after which time she lived in *England* until her death. No sequestration was issued against her. On the further consideration of the suit of *Cross* v. *Maltby*, on the 23rd of December, 1863, on which *Hannah Cross* appeared by counsel, an order was made that certain sums of money due by way of costs to *Hannah Cross*, as legal personal representative of the testator, and certain sums of stock and cash therein mentioned, forming part of the trust estate, and to which *Hannah Cross* was then and might thereafter become entitled should be carried over to an account entitled, "The account of *Hannah Cross*. Funds applicable to the repayment of the trust funds misappropriated previously to the first bankruptcy of *John B. Cross*."

The funds so directed to be carried over included the dividends from time to time, during the life of *Hannah Cross*, to accrue due on a sum of £1386 2*s*. 3*d*. Bank 3 per Cent. Annuities, which had been set apart to answer the £1200 Bank 3½ per Cent. Annuities to which she was entitled under the will of *John Cross*.

The same order contained similar directions for carrying over certain other sums of stock and cash, part of the trust estate, to which *J. B. Cross* then was or thereafter should become entitled, to like accounts, in which they were to be designated as "funds applicable to the repayment of the misappropriated trust funds."

It was further ordered that the stock and cash so carried over to such several accounts should be from time to time apportioned between the parties interested therein in due proportions.

And an inquiry was directed as to the steps proper to be taken

C. A. 1882 — *In re* Cross. — Harston v. Tenison.

for the purpose of making the interests of *J. B. Cross* and *Hannah Cross* in the testator's estate available towards making good the misappropriated trust funds.

No personal order was, however, made on *Hannah Cross* for payment of the amount of the defalcation, either then or on the subsequent further consideration of the suit on the 23rd of February, 1866, nor were any further steps taken against her, though after her return to *England* in 1870 she was, to the knowledge of the Plaintiff and the *cestuis que trust* under the will, living in the neighbourhood of *London*.

Various sums of stock and cash which had been carried over to the separate accounts were subsequently, in pursuance of the order of the 23rd of February, 1866, and of another order dated the 19th of June, 1871, apportioned among the several persons interested in the trust estate, thus reducing the original liability of *Hannah Cross*.

John B. Cross died on the 4th of March, 1873; two of his grandchildren were then living, who were then, and at the date of the institution of the action, infants.

James Cross, another son of the testator, died on the 24th of December, 1872, leaving a daughter, *Florence Ada Cross*, born on the 4th of February, 1860, who was still living at the trial of the action.

The interests of these three grandchildren in the testator's estate had been declared in orders made in *Cross* v. *Maltby*.

The amount due from *Hannah Cross* at the date of her death in respect of her breach of trust, after taking into account the several sums which had been paid to the above-mentioned accounts, was the sum of £3023 12*s*. 8*d*. Her estate comprised, among other things, £788 6*s*. 2*d*. cash and £2500 *Victoria* Government Debenture Stock.

The Defendants resisted the action on the ground that the Plaintiff's claim, if he ever had a claim enforceable against *Hannah Cross*, was barred by the Statutes of Limitation, or, at any rate, was not enforceable against her estate by reason of acquiescence and laches on the part of the persons who might otherwise have been entitled to enforce it.

The action came on for trial on the 14th of November, 1881.

J. Pearson, Q.C., and *Daniel Jones*, for the Plaintiff:—

The Plaintiff's debt was proved in the former suit of *Cross* v. *Maltby*. The order of the 15th of November, 1860, for payment of the amount of the breaches of trust was only an interlocutory one, and that suit is not yet at an end. But the breaches of trust were ascertained, and the Plaintiff is entitled to recover the amount from the estate of *Hannah Cross*.

Cookson, Q.C., and *W. D. Rawlins*, for the executors:—

The Plaintiff is suing for the judgment debt established by the order of November, 1860, and his right to do so is now barred by the *Statute of Limitations*. Lapse of time, it is true, will not bar a *cestui que trust* from suing his trustee in respect of a breach of trust, but the Plaintiff is not a *cestui que trust*. He is a new trustee suing in respect of a debt resulting from a breach of trust committed by the former trustee before his appointment. This action is a creditors' action, and the liability for the breach of trust is merged in the order of November, 1860. A trustee could only sue his co-trustee for contribution. But the Plaintiff's sole title is the order of November, 1860. That was a personal order enforceable by attachment or sequestration, and in no other way; and the remedy under it, as against *Hannah Cross*, was put an end to by her death. The Plaintiff, having elected to proceed against her in that way, cannot pursue another remedy now. But if the order of November, 1860, is equivalent to a judgment for a debt, the *Statute of Limitations* (3 & 4 Will. 4, c. 27) applies. Sect. 40 applies to a claim to enforce a judgment debt against personal estate: *Watson* v. *Birch* (1); 1 & 2 Vict. c. 110, s. 18. An attachment can issue against a trustee in such a case notwithstanding the *Debtors Act*, 1869: *Digby* v. *Turner* (2); General Order of Court of Chancery, 7th January, 1870, rules 7, 9. There has been no payment or acknowledgment of the debt such as will prevent the statute from running. The orders of the 23rd of February, 1866, and 19th of June, 1871, have no such effect. The payment or acknowledgment must be a voluntary act, and the payment must be by the person liable to the person entitled, not to the Court: *Chinnery* v. *Evans* (3).

(1) 15 Sim. 523. (2) 21 W. R. 471. (3) 11 H. L. C. 115.

C. A.
1882
In re CROSS.
HARSTON *v.* TENISON.

[FRY, J., referred to *Harlock* v. *Ashberry* (1).]

But, whether the *Statute of Limitations* applies or not, this is a stale demand which a Court of Equity will not now interfere to enforce. Though *Hannah Cross* was out of the jurisdiction of the Court when the order of November, 1860, was made, she was in 1870 living in the neighbourhood of *London*, and was apparently then occuping a good position in life. This was known to the persons beneficially entitled, and they with this knowledge deliberately elected not to proceed against her. After such a delay, this Court will not assist them: *Pickering* v. *Lord Stamford* (2); *Beckford* v. *Wade* (3); *Spackman* v. *Evans* (4); *Pattison* v. *Hawkesworth* (5).

J. Pearson, in reply.

It is the duty of a trustee to get in all the assets of the trust estate, and he is therefore entitled to sue the representatives of a dead trustee who has committed a breach of trust. The trustees represent the trust estate, which is the real creditor. I am an inchoate creditor in the administration of her estate, though I shall not be an absolute one until I obtain a judgment. The order of November, 1860, in the other suit was not a final one, it was only interlocutory. In *Damer* v. *Earl of Portarlington* (6) Lord *Cottenham* said (speaking of the Plaintiff), "He would not be liable for any misconduct of the trustees prior to his own appointment, merely because he did not file a bill against them." This implies that a new trustee can sue the prior trustees in respect of a breach of trust.

[FRY, J.:—Is there an instance to be found of a bill filed by new trustees against the old trustees in respect of a breach of trust committed by them, the *cestuis que trust* not being parties?]

The new trustees are trustees of the testator's will. On the appointment of the new trustees the old trustees became strangers and they are accountable to the trust estate which is represented by the new trustees, and can be sued by them. The vesting order

(1) 18 Ch. D. 229; 19 Ch. D. 539.
(2) 2 Ves. 581.
(3) 17 Ves. 87.
(4) Law Rep. 3 H. L. 171.
(5) 10 Beav. 375.
(6) 2 Ph. 30, 33.

only gave them additional powers to sue for *choses in action* in the names of the old trustees. The debt is an equitable debt founded on a *delictum*, not on a contract, and the *Statute of Limitations* does not apply to it: *Brittlebank* v. *Goodwin* (1); even if it does, the payments which were made after the order of November, 1860, cannot be considered as made *in invitum*. The apportionment made by the Court was, in fact, a payment made by the Court on behalf of *Hannah Cross*, and it prevents the statute from running. *Chinnery* v. *Evans* (2) is not inconsistent with this view. There is, in fact, a trust on the part of the old trustees to hand over all the trust estates to the new trustees, and in this sense the new trustees are *cestuis que trust* of the old trustees and are entitled to sue them.

The doctrine of stale demand does not apply.

Fry, J., after stating the effect of the will under which the widow became tenant for life, and the dates of the breaches of trust, proceeded :—

The principal defalcations arose from the sale of annuities in the years 1843 and 1845, now nearer forty than thirty years ago. It further appears that the trustees continued to make the payments to the tenant for life down to October, 1849, and that then they ceased to make those payments. I think it must be taken from that that the *cestuis que trust*, or some of them, in October, 1849, must have become aware of the defalcations of their trustees, because nothing is so calculated to awaken the fears of *cestuis que trust* as to find that the annual payments, which will be made if the fund is there, are not made.

In 1856 the old trustees, *Hannah* and *John Berryhill Cross*, were displaced, and two gentlemen, named *Maltby* and *Harston*, were appointed trustees in their place, and a vesting order was made by the Court under the *Trustee Act*, 1850, which vested in them the right to sue for *choses in action* subject to the trusts of the will. Mr. *Pearson* does not rely upon the terms of that order as creating any right in the trustees to sue in respect of the old breaches of trust which they would not otherwise have possessed, and in that view I think he is perfectly correct, because the 27th

(1) Law Rep. 5 Eq. 545. (2) 11 H. L. C. 115.

C. A. 1882 *In re* CROSS. HARSTON *v.* TENISON. Fry, J.

section of the Act of 1850 defines the effect of an order of this sort, as enabling the new trustees to sue for *choses in action* in the same manner in all respects as the old trustees could have done.

Now, it is plain that the old trustees could not themselves have sued in respect of these breaches of trust, and therefore that order did not vest in them any right of action against the new trustees. Mr. *Pearson* contends, and I do not decide that he is wrong, that the mere fact that the old trustees did not convey or assign to the new trustees these annuities, which constituted part of the estate of the testator, gave an equitable right to the new trustees to sue the old trustees to make good that default. Whether that be so or not, it is plain that a right to sue the old trustees subsisted in the *cestuis que trust.*

[After stating the nature of the suit of *Cross* v. *Maltby* and the effect of the Chief Clerk's certificate, his Lordship proceeded:—] The amount therefore of the defalcation was reduced to a certainty in July, 1860, now more than twenty-one years ago.

The Court in the following November made an order on *Hannah Cross* for the transfer into Court of the capital amount, £4100 annuities, and it appears from the evidence before me that in 1861 an order was obtained for an attachment to put her in contempt, which was served upon her, and that she made default in obeying that order, and so became guilty of contempt. It appears further that her residence was not at that time known, and an order was obtained for substituted service on her. Therefore I have no doubt that the Plaintiff is right when he suggests that *Hannah Cross* was at that time not capable of being discovered.

However, in 1863, an order was made on the further consideration of the suit, and she then appeared by counsel in the ordinary manner. No step was then taken to enforce the order of November, 1860, her property was not sequestrated, and she was not interfered with. She returned to this country in the year 1870, according to the Defendant's statement. She was known to the Plaintiff to be in this country in 1871. She was visited by the Plaintiff frequently between that year and the date of her death in 1880, but, from the service on her in 1861 of the order of 1860 down to the time of her death in 1880, no proceedings were taken

to enforce that order, her property was not sequestrated, and the order of November, 1860, remained a dead letter.

In 1863, as I have already mentioned, the case came on for further consideration, and *Hannah Cross* appeared by counsel. Now what was done on that occasion is very material to consider. The Court found that both *Hannah* and *John Berryhill Cross* had interests under the testator's will. The Court found that *Hannah Cross* was entitled to certain costs as the legal personal representative of the testator, and all sums which were coming to her, by way of costs or under the will, were set aside to answer by way of accumulation the £4100 annuities and the cash in respect of which she had made default, and an inquiry was directed what steps should be taken to make available the interests of *John Berryhill Cross* and *Hannah Cross* in the estate of the testator towards making good their misapplication of the trust funds. But what is very remarkable is this, that no order is made on *Hannah Cross*, who, as I have said more than once, then appeared by counsel, for the payment of the ascertained defalcation. That course of conduct appears to me to be consistent only with this, that the *cestuis que trust*, who were then present before the Court, were minded, not to pursue her personally, but were content with the impounding of the funds which would otherwise accrue to her. The matter went on. The case came on again for subsequent further consideration in 1866, and then no proceedings were taken upon the inquiry which was directed with regard to the other interest which had not been dealt with by the previous order on further consideration, and again no personal order was taken against *Hannah Cross*. The only other proceedings which have taken place in the suit have been proceedings in 1865, 1866, and 1871 to work out the order with regard to the impounding of the interests of *Hannah* and *John Berryhill Cross* in the testator's estate, but from July, 1860, when the personal liability of *Hannah Cross* was ascertained, down to the institution of this action, although there was pending a suit addressed to ascertaining the amount and making her liable, no order was ever pronounced.

What is this, then, but a stale demand? It is a case in which the persons who are interested in the demand have been willing to look to the security which they got by the impounding order

C. A. 1882 *In re* Cross. Harston v. Tenison. Fry, J.

and to look to nothing else, and although they had her before the Court, and *John Berryhill Cross*, who is liable with her for default, and the *cestuis que trust* were before the Court, and they had the amount ascertained, they never thought fit to ask the Court for an order making her personally liable. It seems to me if I were after that to accede to this application I should be doing that which the Court has always refused to do, viz., enforcing a stale demand, and I should be enforcing a stale demand while there has for the last twenty years been pending an action in respect of that very demand in which judgment might have been obtained.

On those grounds I dismiss this action with costs.

W. L. C.

C. A.

The Plaintiff appealed from this judgment. The appeal was heard on the 19th of December, 1881.

J. Pearson, Q.C., and *Daniel Jones*, for the Appellant:—

The learned Judge decided against the Plaintiff on the ground that his claim was a stale demand, but the suit of *Cross* v. *Maltby* is a still subsisting suit; no final decree has been made in it. As far as regards all the orders made in that suit mentioned by the Judge after November, 1860, with the exception of the order of 1871, *Hannah Cross's* place of abode was not to be found, and it was useless obtaining orders against her. There was a subsisting order by which her interest was impounded towards discharging the debt due from her, and a *cestui que trust* does not by taking part of his right, in the absence of an express intention so to do, abandon the remainder.

Cookson, Q.C., and *W. D. Rawlins*, for the Defendants:—

It would be impossible, if adults were alone concerned, for this action to be maintained. The conduct of the beneficiaries throughout the whole course of the proceedings would preclude all claim to relief. The defalcations were ascertained in 1847, an order, which we say was final, was made for payment in 1860. In 1863, although she was abroad, she appeared by counsel, and an order was made impounding all her interest; and then, from 1870 to 1880, when she died, her residence was in *London*, and was well

known to the Plaintiff; and now, almost immediately after her death, this action is brought against her executors, who can know nothing of the reasons why she was not sued. The Court cannot do otherwise than treat this as a stale demand.

But it is said that there are infants interested; but the Plaintiff has chosen to institute this action on behalf of all the creditors; if he is not a creditor himself he cannot now bolster up his action by saying that he is suing on behalf of some one else; if he is not a creditor he fails, and it cannot be said that he is a creditor after all this lapse of time—from 1847 to 1880. The action, if any, ought to have been an action for revivor in the old suit against the legal personal representatives of *Hannah Cross* to obtain from her estate what is due from her. But, neglecting the ordinary course of proceeding, the Plaintiff starts an independent action on which he stakes his position as a creditor. This is not a supplemental action, nor are any of the parties beneficially interested parties to it, and it cannot therefore be treated as a beneficiaries' action; but it is a creditors' action and nothing else, and then we have a good answer, that it is for a stale demand.

If a trustee with knowledge of his rights stands by for such a period as would, in the case of a beneficial owner, preclude him from enforcing his rights, the *cestuis que trust* are bound by his acquiescence; they have their right as against their trustee: *Hovenden* v. *Lord Annesley* (1); *Lewin* on Trusts (2); and after a great lapse of time and laches on the part of a *cestui que trust*, then even his right as against his trustee is gone: *Bright* v. *Legerton* (3).

J. Pearson, in reply:—

This action was framed on the authority of *May* v. *Selby* (4), where it was held that a trustee might file a bill against his co-trustee to recover the trust fund without making the *cestuis que trust* parties, and where, as here, the object is to obtain administration of the real and personal estate of the defaulting trustee, the Plaintiff must necessarily sue on behalf of himself and other creditors. Order XVI., rule 7, enables trustees to sue and be sued without joining any parties beneficially interested in the estate.

(1) 2 Sch. & Lef. 607.
(2) 6th Ed. p. 708.
(3) 29 Beav. 60; 2 D. F. & J. 606.
(4) 1 Y. & C. Ch. 235.

C. A.
1882
In re CROSS.
HARSTON *v.* TENISON.

I admit that if a trustee has allowed a stranger by adverse possession to acquire a title as against him, the *cestui que trust* is barred as against that stranger, but the present action is between trustee and *cestui que trust.*

1882. Jan. 16. BAGGALLAY, L.J., now delivered the written judgment of the Court (Lord *Coleridge,* L.C.J., Sir *J. Hannen,* and *Baggallay,* L.J.). His Lordship, after fully stating the facts as above set forth, proceeded :—

There is no dispute as to the breach of trust having been committed, nor is it alleged or suggested that the loss thereby occasioned to the trust estate has ever been made good; but it has been contended on behalf of the Defendants, and such contention has found favour with Mr. Justice *Fry,* that if the Plaintiff was ever entitled to enforce any claim against *Hannah Cross,* such claim was at the commencement of the present action barred by the *Statute of Limitations,* or, at any rate, was not enforceable against her estate by reason of acquiescence and laches on the part of those who might otherwise have been entitled to enforce it.

It was also contended that the Plaintiff, as surviving trustee of the will of *J. Cross,* was not entitled to maintain the present action; that if any action could be maintained, the persons beneficially interested in the testator's estate were alone entitled to sue, and that, at any rate, the Plaintiff could not maintain the action without making some one or more of the parties beneficially interested parties to it.

As regards the last defence, we think it unnecessary to say more than that if at the time of the death of *Hannah Cross* there was a debt due from her to the trust estate, the Plaintiff, as the surviving trustee of the will, the trust of which had not as yet been accomplished, was the proper person to sue for its recovery. This was shewn by the case of *May* v. *Selby* (1), which was decided some thirty years ago in accordance with what was then a recognised practice of the Court, and is a clear authority upon the point. We may add that had there been any force in the objection it would have been removed by leave being given to amend,

(1) 1 Y. & C. Ch. 235.

which, under the circumstances of the case, we should have felt no hesitation in giving.

With reference to the contention that any claim which the parties interested in the trust estate, whether as trustee or *cestui que trust*, ever had against *Hannah Cross* was barred by the Statutes of Limitation before the present action was commenced, it is sufficient to state the recognised doctrine of equity that as between the trustee and the *cestui que trust* no time will operate as a bar to the equitable claim of the latter in respect of a breach of an express trust; the 2nd rule of the 25th section of the *Judicature Act* of 1873, which provides that "no claim of a *cestui que trust* against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitations," is but a statutory declaration of a law which had always been recognised and administered in Courts of Equity. But the question remains whether, having regard to the nature of the breach of trust committed by *Hannah Cross*, and the subsequent conduct of the parties interested in asserting any claim in respect thereof, there has not been such an amount of acquiescence and laches on the part of the parties interested as to make it inequitable that relief should be given to them in the present action; for the doctrine, that where there is an express trust delay in seeking relief in respect of a breach of it is not material, does not apply to a case in which there has been acquiescence or gross laches on the part of the *cestui que trust*. See *Bright* v. *Legerton* (1), affirmed by Lord *Campbell* on appeal (2).

[His Lordship then stated the facts as to the breach of trust, the institution of the suit of *Cross* v. *Maltby*, and the decree of the 22nd of May, 1859, the certificate of the Chief Clerk, the order of the 15th of November, 1860, in that suit, the issue of process of contempt against *Hannah Cross* for disobedience to that order, and her departure abroad, and proceeded:—]

The order of the 15th of November, 1860, though it became binding on *Hannah Cross*, and ought to have been obeyed by her, in no way deprived the parties interested in the trust estate of such other right to relief as they might have against her, nor was

(1) 29 Beav. 60. (2) 2 D. F. & J. 606.

C. A. 1882 *In re* Cross. Harston v. Tenison.

the claim which the trustees of the will of *John Cross* were entitled to enforce against her in respect of her breach of trust limited to the claim under such order, as has been suggested by the Defendants in their statement of defence, and also to some extent in the arguments of their counsel.

In the course, however, of the arguments on behalf of the Defendants, greater importance has been attributed to the order made upon the hearing of the cause of *Cross* v. *Maltby* on further consideration. [His Lordship read the order, and proceeded:—]

It has been argued before us, as it had been argued, and successfully argued, before Mr. Justice *Fry*, that from the course pursued by the *cestuis que trust* upon the hearing of the cause of *Cross* v. *Maltby* on further consideration, they must be presumed to have intended to rest content with impounding the funds which represented the interests of *John Berryhill Cross* and *Hannah Cross* in the testator's estate, and to abandon all other remedies against *Hannah Cross*. There is no doubt but that in a case in which the conduct of the parties permits of such a view being taken the Court will presume from their conduct that they intended to abandon a right which, but for such abandonment, they would have been at liberty to enforce; but, with every respect for the opinion of the learned Judge by whom the action was tried, a copy of whose judgment has been supplied to us, and has been fully considered by us, we are unable to find any substantial grounds for making the presumption which he has apparently made in the present case. We consider it to be a well-established rule that a *cestui que trust* who, knowing that his trustee has committed a breach of trust, obtains from him a part only of that to which he is entitled, does not thereby waive his right to such further relief as he may be able to obtain, unless there is something in the surrounding circumstances from which an intention so to do can be clearly inferred. What is there in the surrounding circumstances to justify a presumption that there was such an intention at the time when the order on further consideration was made? Mr. Justice *Fry* appears to have been much impressed by the circumstance that, although *Hannah Cross* was represented by counsel on the 23rd of December, 1863, no order was made upon her for the payment of the ascertained

defalcation; but it must be borne in mind that, though she was represented by counsel, she was absent from *England*, and it is not suggested that she had any property in this country other than her interests in the trust estate which could have been made available for the satisfaction of what she might be ordered to pay. The *cestuis que trust* got what they could "out of the wreck." They impounded all her interests in the trust estate over which the Court had control, including what might become due to her as a legal personal representative of the testator in the way of costs. She apparently had no other property. In our opinion there was nothing in their conduct to suggest that they waived or intended to waive any rights which they might have against her or her estate, should she again come within the jurisdiction of the Court or become possessed of property which could be made available for the satisfaction of their demand.

But it has been suggested that, though the conduct of the *cestuis que trust* previously to and at the date of the order on further consideration may not have been such as to support the contention of the Defendants that all claims against the said *Hannah Cross*, except such as were enforced by that order, had been then abandoned, yet that the subsequent conduct of the same parties has been such as to preclude them from now enforcing any such claim as that sought to be enforced in the present action; and in support of this view the Defendants rely upon the fact that when the cause of *Cross* v. *Maltby* was heard on subsequent further consideration on the 23rd of February, 1866, no personal order was taken against *Hannah Cross*, and upon the further fact that, though *Hannah Cross* returned to *England* in 1870, and remained within the jurisdiction until her death in 1880, no further proceedings were taken against her. It appears to us to be a sufficient answer to this suggestion, that at the date of the order of 1866 *Hannah Cross* was still out of the jurisdiction of the Court, and that there is no suggestion that subsequently to her return to *England* in 1870 she was, to the knowledge of any of the parties interested in enforcing any claims against her, possessed of any property which could be made available for that purpose. To have taken proceedings against her would in all probability have led to further expense and loss. So far, then, as the case of the Defendants is rested upon an alleged

C. A. 1882 *In re* CROSS. HARSTON *v.* TENISON.

acquiescence or laches of the parties interested in the trust estate, it cannot, in our opinion, prevail.

But an argument has been pressed upon us by the counsel for the Plaintiff, which, if well founded, appears to us to be conclusive as to the right of the Plaintiff to judgment in his favour. It was to the effect that several of the beneficiaries under the will of *John Cross* were infants at the time when the present action was commenced, and that to the extent of their interests, at least, there could be no such bar or answer to their claims as was contended for by the Defendants. It does not appear that this point was brought to the attention of Mr. Justice *Fry;* it is in no way noticed in his judgment. We have already adverted to the fact that under the trusts declared by the will of *John Cross* all the issue of each of his sons living at the death of such son took beneficial interests in the trust estate. Now, the testator's son, *John Berryhill Cross*, died on the 4th of March, 1873. At the time of his decease there were two of his grandchildren living, who then were and still are infants, viz., *Elizabeth Ann Moore*, who was born on the 13th of March, 1863, and *Sidney Moore*, who was born on the 16th of March, 1864. Moreover, *James Cross*, another son of the testator, died on the 24th of December, 1872, leaving a daughter, *Florence Ada*, who is still living, and who was an infant at the time when the present action was commenced. All these three grandchildren of *John Cross* have been recognised by the Court as having beneficial interests in the trust estate in orders made in the cause of *Cross* v. *Maltby*. It is clear that by no act of their own could any of these three beneficiaries be debarred of their rights to have the breach of trust committed by *Hannah Cross* made good out of her estate. And there are probably others of the beneficiaries who attained their majorities at comparatively recent periods. To meet the argument so raised on behalf of the Plaintiff, the counsel for the Defendants urged upon us that the claim of a *cestui que trust* can be barred by lapse of time operating against his trustee, and they cited and relied upon the judgment of Lord *Redesdale* in *Hovenden* v. *Lord Annesley* (1) as supporting this view. But the case with which Lord *Redesdale* was dealing was not between *cestui que trust* and trustee in respect of a breach of an express trust committed by such trustee, but

(1) 2 Sch. & Lef. 607.

between *cestui que trust* and a third party, whom it was proposed to treat as a constructive trustee by reason of dealings between himself and the express trustee. Moreover, we feel bound to say that we can see nothing in the conduct of the Plaintiff which, had he been a beneficiary under the will, would have amounted to acquiescence or laches on his part sufficient to debar him from enforcing any claim which he might have otherwise had against the estate of *Hannah Cross*. It is clear that, under the circumstances to which reference has been made, the Plaintiff was not bound to institute proceedings against *Hannah Cross* at the risk of having himself to bear the costs thereof.

Pursuant to the order of the 23rd of February, 1866, and to another order made on the 19th of June, 1871, further sums of stock and cash which had been carried over to the credit of the before-mentioned separate accounts were apportioned between the parties interested in the trust estate, and by means of such apportionments the amount for which *Hannah Cross* was liable at her death in respect of her breach of trust was to some extent reduced. Certain other sums of stock and cash were also at her death standing to the credit of the said accounts which appear to have been properly applicable under orders to be made for that purpose to the further reduction of the amount of such liability.

It is, however, unnecessary at the present time to ascertain the amount of such liability with accuracy. If at the time of the death of *Hannah Cross* there was a sufficient sum due from her estate to the Plaintiff as surviving trustee of the will of *John Cross* to justify a judgment in the Plaintiff's favour in the present action, and in our opinion there was, the actual amount so due will be ascertained in the course of the inquiries which, under such circumstances, would be directed. It follows that the appeal must be allowed. The order made by Mr. Justice *Fry* will be discharged, and in lieu thereof an order made for the administration of the estate of *Hannah Cross* in the form usually adopted in creditors' actions. As regards the costs of the appeal, we think that both parties should have their costs as costs in the action.

Solicitors for Appellant: *Jackson & Wright.*
Solicitors for Defendants: *Bolton, Robbins, & Busk.*

M. W.

C. A.
1882
Jan. 19, 26.

Ex parte CHILD. *In re* OTTAWAY.

Court of Bankruptcy—Practice—Evidence—Cross-Examination on Affidavit—Right to withdraw Affidavit.

Held (in accordance with a certificate of the Registrars of the *London* Court of Bankruptcy), that, according to the practice of that Court, when an affidavit has been filed by one of the parties to an application, the opposite party is not entitled to cross-examine the deponent on the affidavit, until it has been read on behalf of the party who has filed it.

That party has a right, if he pleases, not to make use of the affidavit, and, if he does not use it, the deponent cannot be cross-examined on it.

Per Jessel, M.R.: In the High Court the deponent could be cross-examined, even if the affidavit was not used by the party who filed it.

THIS was an appeal from a decision of Mr. Registrar *Hazlitt*, acting as Chief Judge in Bankruptcy.

William Winn, a creditor of *J. B. Ottaway*, a liquidating debtor, applied by motion to the Court of Bankruptcy for an order that the costs, charges, and expenses, incurred by him in an examination of the debtor and several other persons, should be paid out of the debtor's estate, if the same was sufficient, and, if not sufficient, should, so far as the same was deficient, be paid by the trustee in the liquidation personally. *Winn* filed an affidavit in support of his application, and the trustee filed an affidavit in opposition.

When the matter came on for hearing by the Registrar, in the course of the opening of the applicant's case, the solicitor who appeared for him claimed the right then to cross-examine the trustee upon his affidavit, or, in the alternative, that the trustee's counsel should undertake to read the affidavit, so that the applicant might, after it had been read, have an opportunity of cross-examining the trustee on it. The trustee's counsel declined to give any such undertaking, and contended that the trustee could not be cross-examined on his affidavit until it was seen whether the affidavit would be used or not. The Registrar held that the applicant's solicitor was entitled, as part of his case, to cross-examine the trustee upon his affidavit. The trustee was then called, and put into the witness-box and sworn, and a ques-

tion was put to him by the applicant's solicitor, but, under the advice of his counsel, he refused to answer. The Registrar then made an order that the trustee should submit to cross-examination on his affidavit. The trustee appealed.

Winslow, Q.C., and *Wyatt Hart*, for the Appellant:—

The right which is claimed is contrary to the settled practice of the Court of Bankruptcy.

[*Warmington*, for *Winn*:—The affidavit is on the file and it cannot be withdrawn.]

In re Sykes's Trusts (1) shews that an affidavit could be withdrawn in the Court of Chancery.

[JESSEL, M.R.:—The question there was whether an affidavit which had been filed could be withdrawn without the consent of both sides.]

Under rule 4 of Order XXXVIII. under the *Judicature Act*, an affidavit cannot, without the special leave of the Court, be used, if notice is given to produce the deponent for cross-examination and he is not produced.

[JESSEL, M.R.:—That rule applies to the trial of an action. The present application is a motion.]

All applications to the Court of Bankruptcy are made by way of motion: Bankruptcy Rules, 1870, r. 50.

[*Warmington* referred to rule 166.

JESSEL, M.R.:—Rule 5 of Order XXXVIII. under the *Judicature Act* gives power to the person to whom notice is given to produce a deponent for cross-examination to compel his attendance.]

We have no objection to the trustee being called by the Respondent as his own witness. He can then treat him as a hostile witness. He can put leading questions to him, but he cannot attempt to damage his character as he could in cross-examination.

[JESSEL, M.R.:—That which is insisted on here can be done under the Judicature Rules.]

(1) 2 J. & H. 415.

C. A.

1882

Ex parte CHILD.

In re OTTAWAY.

Those rules do not apply to the Court of Bankruptcy.

[They were stopped by the Court.]

Warmington, for *Winn*:—

The right to cross-examine is more important than in the High Court, for evidence in reply cannot be adduced on a motion in the Court of Bankruptcy: Rule 54. On the trial of an action the plaintiff is not heard in reply until after the cross-examination of the witnesses on the other side. If the defendant calls a witness the plaintiff can cross-examine him. The filing of an affidavit is equivalent to the calling of a witness. An affidavit on the file cannot be taken off without the leave of the Court. The practice of the Court of Bankruptcy has been moulded on that of the Court of Chancery. The true analogy is to be found in the practice upon a summons in the winding-up of a company; there all the evidence is completed before the summons comes on for hearing.

The Court consulted the Registrars of the Court of Bankruptcy as to the practice, and the following certificate was given by Mr. Registrar *Murray*:—

"In accordance with your Lordships' desire for information as to the practice which obtains in the *London* Bankruptcy Court on the hearing of applications based upon affidavit evidence, I beg to furnish the following statement:—

"As a general rule, and in the absence of objection, all the affidavits which may have been filed in due time (as regulated by the General Rules, No. 50, &c.), whether filed on behalf of the applicant or respondent, including those (if any) filed in reply, are, on the opening of the case, read to the Court, and if notice to cross-examine any of the witnesses on the one side or the other has been given, the cross-examination of the applicant's witnesses is taken first and concluded, and then the cross-examination of the respondent's witnesses, after which the advocates for the respective parties are heard on the whole case. If, however, on the opening, the respondent alleges that there is no case, and objects to his affidavits being read until that question has been disposed of, such objection is always allowed; and it frequently

happens that, by reason of the applicant's evidence failing to establish his case, the respondent is not called upon to read his affidavits, or to enter at all on his defence. The result would be analogous to a nonsuit. I have never known a case in which a party has been held compellable to read an affidavit (which he desired to withdraw) merely because it had been filed; but this would not preclude the opposite party from being allowed to examine the deponent as his own witness. The question sometimes arises in this way. An affidavit having been filed, the opposite party gives notice to cross-examine. By accident or otherwise the deponent is not present for cross-examination. On objection being taken that the affidavit cannot be read, one of two alternatives happens. Either the party on whose behalf it has been filed elects to withdraw the affidavit, which the Court invariably holds him at liberty to do, or, if he desires to use it, the Court, on application, will (upon terms as to costs) adjourn the further hearing, that the deponent may attend for cross-examination.

"I have submitted this statement to my colleagues, and we have all discussed it; and I am authorized by them to add that they entirely concur in my view of the practice as above given. As regards the particular point now before the Court of Appeal for decision, we are not aware that the question has ever before arisen in practice."

JESSEL, M.R.:—

According to the certificate of the Registrars it was the undoubted right of the Respondent (the present Appellant) to say that he would not state whether he meant to read his affidavit or not until his turn came to open his case, and he was entitled to object to be cross-examined on the affidavit until he had determined whether he meant to read it or not. This is settled by the certificate, though, apparently, it was not settled before. The appeal must, therefore, be allowed, and the order of the Registrar be discharged. The Appellant's counsel does not object to other evidence being adduced, and the applicant will have liberty to adduce such evidence as he may be advised, and he can, if he choose, call the trustee as his witness. As to the

C. A. 1882 *Ex parte* CHILD. *In re* OTTAWAY.

costs of the appeal, it would be hard to make either side pay them. Justice will be done by making them costs in the matter.

BRETT and HOLKER, L.JJ., concurred.

Solicitor for Appellant: *G. J. Eady.*
Solicitor for Respondent: *A. G. Ditton.*

W. L. C.

C. A. 1882 *Feb.* 14.

GENERAL SHARE AND TRUST COMPANY *v.* WETLEY BRICK AND POTTERY COMPANY.

[1881 G. 483.]

Practice—Order of Appeal Court—Varying Minutes—Notice of Motion to vary.

Where any party is dissatisfied with an order as settled by the Registrar, and desires to bring the matter before the Court, he must, whether the order be an order of the Court of Appeal or of a Court of first instance, give notice of motion to vary the minutes.

AN order made by the Court of Appeal in the above-named action had been settled by the Registrar, but the parties differed as to the meaning of the order so settled.

E. S. Ford now applied *ex parte* for instructions whether the rule which prevailed as to orders of a Court of first instance requiring a notice of motion to vary the minutes also applied to orders of the Appeal Court, or whether it would be sufficient to speak to the cause on the minutes.

JESSEL, M.R.:—

The proper course as regards orders of the Appeal Court, equally with those of a Court of first instance, is for the party who is dissatisfied with the order as settled to give notice of motion to vary the minutes. The Court will then be enabled to know how to deal with the costs of the application.

BRETT and HOLKER, L.JJ., concurred.

Solicitor: *T. C. Russel.*

M. W.

Ex parte LESLIE. *In re* GUERRIER.

C. A. 1882 Feb. 16.

Proof in Bankruptcy—Claim arising out of Felony—Compounding a Felony.

Bankers allowed a customer to overdraw his current account on his depositing with them as security for the overdraft some bills of exchange drawn by him upon, and purporting to be accepted by, a third person. After the customer had overdrawn his account the bankers discovered that the acceptances were forgeries. They then communicated with the customer, and ultimately gave up the forged acceptances to him, receiving from him in exchange joint and several promissory notes of himself and his father. The customer was afterwards adjudicated a bankrupt. The notes were not paid at maturity:—

Held, that, though the bankers had not prosecuted the bankrupt for the felony, and whether they had or had not agreed not to prosecute him, they were entitled to prove in the bankruptcy for the balance due to them upon the bankrupt's current account.

THIS was an appeal from a decision of Mr. Registrar *Brougham*, acting as Chief Judge in Bankruptcy.

A proof was tendered against the estate of *G. E. Guerrier*, a bankrupt, by Messrs. *W.* and *J. Biggerstaff*, bankers, with whom he had kept an account, for the sum of £5585, the balance due upon his current account at the commencement of the bankruptcy. He had been allowed by the bankers to overdraw his account, upon depositing with them as security for the overdraft some bills of exchange drawn by him upon, and purporting to be accepted by, a firm of *Batt & Co.* Some time after the bills had been deposited the bankers discovered that the acceptances of *Batt & Co.* were forgeries. The bankers then communicated with the bankrupt and his father, and ultimately gave up the forged bills to the bankrupt, receiving in exchange for them some joint and several promissory notes of himself and his father. In their proof, which was for money lent to the bankrupt at his request and interest thereon, the bankers stated that they held no security for their debt, except the promissory notes of the bankrupt and his father, and a policy of assurance on the bankrupt's life, the value of which they estimated at £100, which value they had allowed for in calculating the amount due to

C. A. 1882 *Ex parte* LESLIE. *In re* GUERRIER.

them. The promissory notes were all overdue. The trustee alleged that, when the forged bills were given up by the bankers, and the promissory notes taken by them in exchange, they had either expressly or tacitly agreed that they would not prosecute the bankrupt for felony, and the trustee rejected the proof to the extent of £4327 10*s.*, on the ground that it arose out of a felony, or that the bankers had been parties to compounding a felony. The Registrar held that there was no evidence that the bankers had compounded a felony, and that, even if the proof arose out of a felony, there was no objection to it, because the bankrupt had been prosecuted and convicted on a charge of forging some other acceptances, and had been sentenced to five years' penal servitude. The Registrar, therefore, ordered the proof to be admitted for the whole amount.

The trustee appealed.

Winslow, Q.C., and *P. Baylis*, for the Appellant:—

The claim arises out of a felony committed by the bankrupt, and in such a case the creditor cannot prove until he has prosecuted the bankrupt for the felony, or some one else has prosecuted him, or a prosecution has become impossible: *Crosby* v. *Leng* (1); *Ex parte Ball* (2); *Wells* v. *Abrahams* (3); *Wellock* v. *Constantine* (4); *Wallace* v. *Hardacre* (5). The person who has been injured by a felony is bound as a public duty to prosecute the felon before he can avail himself of his civil remedy. If the bankrupt was being sued as drawer of the bills this principle would apply; why should it not equally apply when he is being sued for the original consideration? The bankers by giving up the forged acceptances put it out of their power to prosecute; in truth, they entered into a tacit agreement that they would not prosecute the bankrupt in consideration of getting the promissory notes in exchange for the forged acceptances. If a transaction is in any way tainted with felony, a proof in bankruptcy in respect of it cannot be admitted, and the bankrupt's trustee is always entitled to raise the objection: *Ex parte Elliot* (6).

(1) 12 East, 409.
(2) 10 Ch. D. 667.
(3) Law Rep. 7 Q. B. 554.
(4) 2 H. & C. 146.
(5) 1 Camp. 45.
(6) 3 Mont. & A. 110.

De Gex, Q.C., and *Upjohn*, for the bankers, were not heard.

C. A.
1882
Ex parte LESLIE.
In re GUERRIER.

JESSEL, M.R.:—

In this case Messrs. *Biggerstaff*, bankers, advanced certain moneys to one *Guerrier*, who was their customer, by allowing him to draw upon them, and in order to induce them to allow this overdraft he deposited with them some forged bills of exchange, which, of course, they did not know to be forged. He afterwards, being desirous of having a further overdraft, deposited with the bankers some more forged bills, the total amount of the bills being over £4000. They now claim to prove in his bankruptcy for the amount of the overdraft. The objection raised by the trustee to the proof is, that the bankers, after they found out that the bills were forged, made some arrangement with the bankrupt and his father to give up the forged bills in consideration of receiving some promissory notes of the father and the son, and it is alleged that that was a corrupt agreement, made for the purpose of screening *Guerrier*, the bankrupt, from being prosecuted for forgery. I will assume for the present purpose that that allegation is well founded; we have not heard the evidence, but I assume it to be so only for the purpose of the argument. Does that destroy the right of the bankers to prove? It appears to me that it does not. One of the inducements to the bankers to allow the overdraft was the deposit of the forged bills, but the loan was an ordinary loan, and the contract for the loan was not destroyed or affected by anything which subsequently occurred.

We have been referred to a line of authorities which seem to shew that when a claim arises out of a felony, you cannot sue for it until you have prosecuted the felon, or some one else has prosecuted him, or a prosecution has become impossible. That may or not be so; I do not wish to discuss that question on the present occasion. But, assuming that it is so, the rule has no application to the present case in which the claim is founded on an independent contract antecedent to the corrupt bargain. In my opinion the decision of the Registrar was correct, and the appeal must be dismissed.

C. A. 1882 *Ex parte* LESLIE. *In re* GUERRIER.

BRETT, L.J.:—

I am of the same opinion. It seems to me a perfectly clear case.

HOLKER, L.J.:—

I am of the same opinion.

Solicitor for trustee: *S. Chapman.*
Solicitors for bankers: *Morgan, Son, & Gilks.*

W. L. C.

C. A. 1882 *Feb.* 18.

In re CLAGETT.
FORDHAM *v.* CLAGETT.

[1880 C. 0509.]

Practice—Time for Appeal—Disallowance of Claim of Creditor under Administration Judgment—Rules of Court, 1875, *Order* LVIII., *r.* 15.

Where a creditor has brought in a claim in answer to advertisements for creditors issued under a judgment for administration, and that claim is disallowed, such disallowance is a refusal within the meaning of Order LVIII., rule 15, and an appeal can be brought from it without any order being drawn up.

IN answer to advertisements for creditors issued under a judgment for administration made in the above action, one *Wyllie* brought in a claim, which was at once referred by the Chief Clerk to Mr. Justice *Kay* to be discussed, and was, after full argument in Court, disallowed. According to the practice as stated, where a claim is disallowed, no order to that effect is drawn up, but the claim is merely omitted from the Chief Clerk's certificate. This certificate had not been filed, nor was there any probability of its being filed before the expiration of the twenty-one days limited by the Order LVIII., rule 15, which would expire on Tuesday the 21st of February.

Wyllie wished to appeal against the disallowance of his claim.

Yate Lee, for *Wyllie*, now applied *ex parte* as to the course to

C. A. 1882 *In re* CLAGETT. FORDHAM *v.* CLAGETT.

be adopted, and submitted that this disallowance was a refusal within the meaning of Order LVIII., rule 15, and that no order need be drawn up. The old practice of moving to vary the certificate could not now, having regard to that order, be followed, as the twenty-one days would have expired before the filing, and he asked that if the drawing up of an order were necessary the time for appealing might be extended.

JESSEL, M.R.:—

We all think that the disallowance of the claim is a refusal within the meaning of Order LVIII., rule 15, from which an appeal can be brought, and no order need be drawn up. There will not therefore be any reason for extending the time to appeal.

BRETT and HOLKER, L.JJ., concurred.

Solicitors: *Horne & Birkett.*

M. W.

In re TATE.

C. A. 1882 *March* 18, 25.

Lunatic—Trustee Relief Act—Jurisdiction.

Where a person who has been found lunatic is entitled to a fund which has been paid into Court under the *Trustee Relief Act*, a petition may be presented in Chancery under the *Trustee Relief Act* and in Lunacy, and the Court has jurisdiction to make an immediate order for the transfer of the fund to the account of the lunatic.

CATHERINE TATE was found lunatic by inquisition: and on the 21st of December, 1881, the Master made his report proposing committees of the estate and of the person, and certifying the particulars of the property of the lunatic.

This property consisted, among other things, of a sum of £2282 3*s.* 8*d.* consols, and a sum of cash, which had been brought into Court under the *Trustee Relief Act* by the personal representative of *M. Treacy* to the account of "the trusts of a legacy bequeathed by *M. Treacy* to *Catherine Tate*:" and of certain funds which had been paid into Court in an action of *Murray* v.

C. A. 1882 *In re* TATE.

Stranger to the account of "the legacy of £200 to *Catherine Tate* for her separate use subject to duty."

A petition was now presented by the persons who had petitioned for the inquisition, praying that the Master's report might be confirmed, and (among other things) that the committee of the estate might be ordered to take the necessary steps for procuring the transfer of the sum of £2282 3*s.* 8*d.* consols, and the sum of cash, standing in Court under the *Trustee Relief Act*, and also the funds standing in Court in the action of *Murray* v. *Stranger*, to the account of the lunatic.

When the petition came on to be heard,

J. Cutler, for the Petitioners, said that with respect to the fund standing in Court under the *Trustee Relief Act*, it would save expense if the Court would make the order for transfer at once, but he could find no precedent for such an order.

THE COURT (*Jessel*, M.R., *Cotton* and *Lindley*, L.JJ.) were of opinion that if the petition were intituled in the Chancery Division and in the matter of the *Trustee Relief Act*, the Court had jurisdiction to make the order.

The petition was accordingly amended by intituling it in the Chancery Division, in the matter of the *Trustee Relief Act* and of the trusts of *M. Treacy's* will, as well as in Lunacy, and the Court made the order for the immediate transfer of the fund in Court under the Act to the account of the lunatic.

E. Walker appeared for the personal representative of *M. Treacy*.

Solicitors: *Pitman & Son*; *Palmer, Eland, & Co.*

M. W.

In re PADSTOW TOTAL LOSS AND COLLISION ASSURANCE ASSOCIATION.

C. A. 1882 Jan. 11.

Winding-up—Companies Act, 1862, s. 4 [*Revised Ed. Statutes, vol. xiv. p.* 203] *—Association of more than Twenty Members—Gain by individual Members —Company, the formation of which is prohibited.*

By the rules of a mutual marine insurance association, which was not registered under the *Companies Act*, it was provided that all persons who effected an insurance with the association should be members. No ship was to be insured for more than three-fourths of its value, the person insuring paid a deposit of 25*s.* per cent. on the amount of the insurance, and in case of the total loss of a vessel, the members were to pay the loser the amount for which he had insured it rateably, according to the amounts assured to them respectively. The association consisted of more than twenty members. A vessel insured by *R.* was lost, and the amount of the loss was referred to arbitration. *R.* assigned his claim to his bankers, who obtained judgment in *R.'s* name on the award, and, not obtaining payment, presented a petition to wind up the association, the petition stating that the association consisted of more than seven members, but not stating that it consisted of more than twenty. The petition was served at the abandoned office of the association which had ceased to carry on business, and the proper advertisements were issued. On the 28th of May, 1880, a winding-up order was made, no one appearing to oppose. In November, 1881, another member of the association heard, for the first time, of the winding-up order, and within a week applied for leave to appeal against it.

Held, that the order having been made by a superior Court having jurisdiction in winding-up, and having authority to decide as to its own competency, must, if the association was one which ought not to be wound up, be treated merely as an erroneous order, and not as an order void for want of jurisdiction, and that the proper manner of getting rid of it was by appeal:

Held, that as the Appellant was not a party to the order, and applied for leave to appeal as soon as he knew of it, he ought to have leave to appeal notwithstanding the lapse of time:

Held, that although the business of the association had not for its object the acquisition of gain by the association, it had for its object the acquisition of gain by the individual members; that as it consisted of more than twenty members and was not registered, its formation was forbidden by the *Companies Act*, 1862, s. 4; that the Court, therefore, could not recognise it as having any legal existence, and that the order for winding it up must be discharged.

THE *Padstow Total Loss and Collision Assurance Association* was a society formed for the purpose of mutual marine insurance. It

C. A. 1882 *In re* PADSTOW TOTAL LOSS AND COLLISION ASSURANCE ASSOCIATION.

was governed by a set of rules which provided: 1. That the society should consist of owners and part owners of vessels, and should meet as often as business might require, and that an annual general meeting should be held in January in each year. 2. That its affairs should be managed by a committee chosen by and from the members, three to form a quorum for ordinary business, and for settling claims. 3. That on any vessel or part thereof being entered in the association, the owner should immediately pay the sum of £1 per cent. on the amount insured, as a deposit towards paying any loss that might happen, and 5*s.* per cent. towards a fund for incidental expenses, and that the said owner on subscribing his name to the legal document of the association should become a member thereof, and be subject to its rules, and that the money deposited should be placed at the disposal of the committee for the time being. 5. That no vessel should be insured at a greater sum than £5000, which amount should not in any case exceed three-quarters of the value of the vessel. 8. That in case any vessel belonging to the association should be taken, lost, wrecked, destroyed by fire, or stranded, and thereby receive so much damage as should induce the owners to abandon her to the association, which they might do if the damage was shewn to exceed £75 per cent. of her entered value, "then the members, their heirs, executors, or administrators, severally and not jointly each one for himself, and not for each other, shall as often as the case shall happen, and after satisfactory proof be given, pay the loser or losers of such vessel the amount insured in this association, rateably and proportionally by each member, according to his amount assured." . . . "In case any vessel insured in this association should run down any other vessel, and the owners be called on to make good the value of the vessel so run down, the association shall either defend any action that may be brought against the owners of the vessel which may have run down such other vessel, and pay its proportion of costs and damages, in such case such costs and damages not to exceed the amount the said vessel is insured in this club, or pay to such owners two-thirds of the sum their vessel may be insured in this association, in either case subject to the usage at *Lloyd's*." 9. "That all drafts for claims shall be duly accepted

and punctually paid when due, and if any member shall neglect or refuse to accept or pay his contribution on receiving notice from the manager, his respective ship or ships shall immediately cease to be insured in or by this association, but he shall still be liable to contribute to all losses which may occur during the continuance of the policy. That the solicitors for the association shall be directed to sue immediately for the amount due, and if not received through the insolvency of the member, the loss shall be borne by the members generally."

These rules were indorsed on the form of policy used by the association, which was nearly identical with the form used at *Lloyd's*. Each policy was signed by the manager, "per procuration of the several members of the *Padstow Total Loss and Collision Assurance Association*, every member bearing his equal proportion according to the sums mutually insured therein." A person became a member by effecting an assurance, no further document being signed.

In September, 1875, a person named *Redway* insured a ship with the association and so became a member. The number of members was more than twenty. The ship was lost within the period covered by the policy, and in August, 1877, the question of compensation was referred to arbitration. In January, 1878, *Redway* assigned his policy and the moneys payable under it to the *Devon and Cornwall Banking Company*. In February, 1878, an award was made finding a sum due to the assured on the policy. The banking company brought an action on the award in the name of *Redway*, and obtained judgment, but could not obtain payment. They then, in 1880, presented a petition for winding up, which was served at the abandoned office of the association—the business having ceased, and was also duly advertised. This petition stated that the association consisted of more than seven members, but did not state that it consisted of more than twenty, a fact of which, so far as it appeared, the Petitioners were at that time unaware. On the 28th of May, 1880, Vice-Chancellor *Malins* made a winding-up order, no one appearing to oppose it. *Bryant*, who had been a member of the association, was not aware of this order till November, 1881, and within a week after hearing of it he applied for leave to appeal, not-

C. A. 1882 — *In re* PADSTOW TOTAL LOSS AND COLLISION ASSURANCE ASSOCIATION.

withstanding the lapse of time. The Court gave leave to give notice of appeal, the appeal to come on at the same time with the application for further time.

Glasse, Q.C., and *Methold*, for the Appellant:—

This was a mutual insurance company of more than twenty members, not registered, and constituted like the *Arthur Average Association* (1). The Master of the Rolls held in that case that such an association being forbidden by the *Companies Act*, 1862, s. 4, was illegal, and that a winding-up order should not have been made, but considered that he could not deal with that on the application before him. The Court of Appeal did not deal with this question.

[JESSEL, M.R.:—In *In re South Wales Atlantic Steamship Company* (2) Lord Justice *James* held that there could be a winding-up order, but that contribution could not be enforced. Lord Justice *Mellish* doubted whether there could be a winding-up, and Lord Justice *Baggallay* was strongly inclined to the opinion that there could not. It appears to me that Lord Justice *James* was mistaken in the latter part of his opinion. If a winding-up order can be made, I think that all the ordinary consequences of such an order must follow.]

In that case an order to wind up was refused in the Court below, because the company was illegal and the petitioner had notice of the illegality.

[JESSEL, M.R.:—It is difficult to see that notice can make any difference for this purpose. How can a company, the formation of which is forbidden, contract a debt, when the law cannot recognise its existence?]

We say that the Court had no jurisdiction to make a winding-up order as to such a body: *In re Plumstead Water Company* (3).

[BRETT, L.J.:—Is it not merely a wrong order?]

No; there is no jurisdiction to wind up except under the Act, and for the purposes of the Act this association has no existence. The petition, on the face of it, is founded on a debt due to a

(1) Law Rep. 10 Ch. 542. (2) 2 Ch. D. 763.
(3) 2 D. F. & J. 20.

member of the association who had full notice of the nature of the association; so if notice of the illegality makes any difference, there is such notice, as the bank cannot be in a better position than their assignor. The case is one where leave to appeal after time will be given, the Appellant being affected by the order, but not being a party, and having applied for leave at once when he heard of it: *Ex parte Tucker* (1); *Ex parte Williamson* (2). If, however, we are right in the contention that the order was made without jurisdiction, the question of time does not arise, though the application is necessarily made to the Court of Appeal and not to the Court below: *In re St. Nazaire Company* (3).

Cookson, Q.C., and *Hornell, contrà*:—

The main question is whether this is an association the formation of which is prohibited by sect. 4. It has been decided that such an association is not within 7 & 8 Vict. c. 110, s. 2: *Bear* v. *Bromley* (4); and it cannot be considered a company carrying on business for the purpose of gain to the company: *Smith* v. *Anderson* (5); *In re South Wales Atlantic Steamship Company* (6).

[JESSEL, M.R., referred to *Reg.* v. *Whitmarsh* (7).]

Is it then a business carried on for the purpose of gain to the individual members? We say not. No member can ever make a gain; if his ship is lost he gets relieved from a portion of that loss, but he does not even get full indemnity. The advertisement of the winding-up petition was notice to everybody: *Chapman's Case* (8). Orders have repeatedly been made for winding up such companies: *In re Arthur Average Association* (9); *In re Shields Marine Insurance Association* (10); *In re London Marine Insurance Association* (11).

JESSEL, M.R.:—

This is an appeal from an order made by Vice-Chancellor *Malins*, but turns on a point which, as I understand, was not

(1) 12 Ch. D. 308.
(2) Law Rep. 5 Ch. 309.
(3) 12 Ch. D. 88.
(4) 18 Q. B. 271.
(5) 15 Ch. D. 247.
(6) 2 Ch. D. 763.
(7) 15 Q. B. 600.
(8) Law Rep. 1 Eq. 346.
(9) Ibid. 10 Ch. 542.
(10) Ibid. 5 Eq. 368.
(11) Law Rep. 8 Eq. 176.

C. A. 1882 *In re* PADSTOW TOTAL LOSS AND COLLISION ASSURANCE ASSOCIATION. Jessel, M.R.

brought to his Lordship's notice at all. The order was in fact, though not in form, made *ex parte*. The petitioner served his petition quite correctly at the abandoned office of the company, the office having been shut up, and there being in fact no office. He also advertised it in the *London Gazette*, which hardly any one reads, and also in two local papers which did not convey any information to the present Appellant. The petition does not state that the number of members of the association exceeded twenty, it only states that they exceeded seven, and there is nothing on the face of the petition to call the attention of the Judge to the question of the lawfulness of the association. Under those circumstances the order was made, and, as I have already said, practically *ex parte*. After a long time had elapsed, the present Appellant having become aware of the order, and seeing that his interest was likely to be affected by it as a contributory, appealed against the order, and at the same time moved for leave to have the appeal heard although the twenty-one days from the date of the order had expired, and that motion comes on now with the appeal.

The first point to be considered is whether, assuming that the association was an unlawful one, and that the Court had no jurisdiction to make the order, an appeal is the proper mode of getting rid of that order. I think that it is. I think that an order made by a Court of competent jurisdiction which has authority to decide as to its own competency must be taken to be a decision by the Court that it has jurisdiction to make the order, and consequently you may appeal from it on the ground that such decision is erroneous.

The next question is whether we ought to give leave to appeal after this long period of time has elapsed. I think that we ought. The present Appellant knew nothing about the order, and when we come to look at the circumstances it is plain that it was obtained without disclosing to the Court the difficulty as to the constitution of the company, which has been the subject of so much discussion to-day. It was therefore an order, I do not say obtained from the Court improperly, for I have no doubt that the counsel who obtained it did not know of the difficulty, but made improvidently, and looking at the circumstances under which it was obtained, and the ignorance of the present Appellant of the

fact of its being obtained, the case appears to me to fall within the authorities cited in favour of giving leave to appeal after the time has expired.

Then comes the important question whether the association was an unlawful one, and if so, whether the order to wind up ought to have been made. I will take the second point first. Assuming the association to be an unlawful one, could the Court properly make the winding-up order? It appears to me to have been decided that it could not, and it seems to me on principle that it could not. The 199th section of the *Companies Act*, 1862, under which the order, if made at all, must be made, applies to a partnership association or company, and it enacts that such a body consisting of more than seven members, and not registered under this Act, and hereinafter included under the term "unregistered company," may be wound up under this Act, and that all the provisions of this Act with respect to winding up shall apply to such company with certain exceptions which are mentioned. Now, obviously that enactment must apply to something which can be lawfully formed. If the case falls within the terms of the 4th section, the formation of the company is prohibited, and it is impossible to suppose that the Legislature could have intended that a company which is prohibited from being formed under the 4th section can be wound up under the 199th, with all the consequences which follow from it, including the application of the 38th section, and the liability of the member of the unlawful association to contribute. It seems to me, therefore, that, both on authority and principle, such an association cannot be wound up.

I now come to the last, and certainly most difficult, question, as it appears to me, which has been argued to-day—is or is not this company or association a company the formation of which is prohibited under the 4th section of the Act? That section says that "No company, association, or partnership consisting of more than twenty persons shall be formed after the commencement of this Act for the purpose of carrying on any other business" (that is, other than banking), "that has for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof, unless it is registered as a company under this Act." In the first place, Is this a company which

C. A. 1882

In re PADSTOW TOTAL LOSS AND COLLISION ASSURANCE ASSOCIATION.

Jessel, M.R.

carried on business? Upon this point I think there can be no doubt. When we look at the document constituting the only evidence which we have of the objects of the company, we find it is in the form of an ordinary policy of marine insurance, in fact it copies *Lloyd's* policy almost *verbatim*. It is a policy of insurance on a ship by certain persons who are described as insurers, and who sign by procuration, that is, the person who signs describes himself as signing *per* procuration for the several members of the *Padstow Total Loss and Collision Assurance Association*, every member bearing his equal proportion of the loss according to the sums mutually assured therein. Therefore it follows the ordinary form of a policy of marine insurance by the several persons who are members of the association. When we come to look at the rules of the association we find that everybody who effects an assurance pays a certain sum which is to be applied towards losses, that is, £1 per cent., and he then pays another sum of 5*s.* per cent. for expenses. Then it is arranged that if his vessel is lost he shall be paid the amount insured. If his vessel runs down another vessel and he is made liable, provision is made for indemnifying him. Then there is a guarantee that all claims shall be duly met, and that if any of the members turn out insolvent and cannot pay their shares, the loss shall be borne by the members generally. Two things, therefore, are provided for: first, the payment of the marine losses sustained by a person insured, and, secondly, the mutual guarantee by the members of each other's solvency as regards the making up of the amount of the loss. There cannot of course in any case be a larger sum obtained by any person insuring his vessel than the amount of the sum for which he has insured her, but there is no other limit. It also appears that the society was one intended to go on from year to year and to last for many years. It was governed by a committee, who managed the affairs of the association on behalf of all its members, and it has every feature of a mutual marine insurance company. Now, was that company, which clearly carried on the business of marine insurance, a company formed for the purpose of carrying on a business other than banking, which had for its object "the acquisition of gain by the company, association, or partnership, or by the individual members thereof?" That it had not

the object of acquiring gain to the company as a whole is plain; but it appears to me equally plain that its object is the acquisition of gain by the individual members. They pay a small sum with the view of receiving a large one in case of the happening of an uncertain event which may or may not happen, and which if it does happen would otherwise cause them a large loss. Is it the less an acquisition of gain because the event which makes it payable happens to be a loss? It does not appear to me that the word "gain" can have any such limitation put upon it. According to the strict meaning of the word there is a gain when the insured receives a large sum in consideration of his having paid a small one, and looking to the general object and intention of the association and to the general purview of the Act of Parliament, it appears to me that the strict meaning of the term is its proper meaning here. The object of the Act was that commercial associations or companies consisting of more than twenty members should be registered. This is clearly an association of that character, and it appears to me to come entirely within the general purview of the Act. We ought, as it appears to me, so to construe the Act as fairly and properly to carry out its provisions without a too minute or hypercritical consideration of its terms. For these reasons it appears to me that the order ought not to have been made, and that this appeal ought to be allowed.

As regards the costs, there seems to have been a general mistake made on all sides, and we think therefore that we ought not to say anything about costs.

BRETT, L.J.:—

In this case an order has been made to wind up an association or company as such. That order was the order of a superior Court, which superior Court has jurisdiction in a certain given state of facts to make a winding-up order, and if there has been a mistake made it is a mistake as to the facts of the particular case and not the assumption of a jurisdiction which the Court had not. I am inclined, therefore, to say that this order could never so long as it existed be treated either by the Court that made it or by any other Court as a nullity, and that the only way of getting rid of it was by appeal. The case, therefore, as it seems to me, is

C. A. 1882 *In re* Padstow Total Loss and Collision Assurance Association. Brett, L.J.

merely one of an erroneous judgment, and I should think that it was subject to the ordinary rules as to the time for bringing an appeal. It is however hardly necessary to decide that in the present case, for assuming the case to be one where the appeal ought to have been brought within a certain time, it is one in which the Court ought to exercise its power of enlarging the time.

Then comes the question whether this order was properly made, and, as I understand the arguments in favour of that order, it is urged that this was a company or an association or a partnership the formation of which was not prohibited either by statute or by the common law, and that it is one which may be properly wound up under the 199th section. Further, it is argued that even supposing that by reason of the 4th section of this Act this is an association or company or partnership which could not properly be formed, yet inasmuch as the petitioners had no notice of the facts which made it improper for it to be formed, they can maintain this order. On the other side I understand the argument to be that the circumstances under which this association was attempted to be formed were such as to bring it within the 4th section, which says that such an association or company or partnership as this shall not be formed, and that therefore there never in this case existed any association or partnership or company which the law can recognise as such or with which the law can in any way deal.

Now if the case is within the 4th section, the words of that section being imperative and prohibitory and negative, it seems to me that the law can take no cognizance of the existence of such an association, and that the absence of notice to the petitioners of these facts cannot enable the law to act in their favour with regard to such an association as if it existed when the law has said that it shall not exist. One is almost afraid to give an opinion upon any thing which it is not necessary to decide in such a difficult case as this, and it may not be necessary to decide that absence of notice makes no difference, for the original policy-holder whose ship was lost being a member of the company clearly had notice of the nature of the company, and inasmuch as the petitioners claim by assignment from him, and so through

him, if he could not have obtained an order to wind up this company neither can they.

Then is this such an association as is described in the 4th section, and the formation of which is thereby prohibited. For my own part I should hardly use the term "illegal association." An association though duly registered might still be an illegal association, inasmuch as the purpose for which it was formed might be illegal, and I do not feel satisfied that such an association would be incapable of being wound up merely on the ground that it was illegal. My view is that this case turns on the question whether the law can say that this alleged association or partnership ever existed at all.

The question then is whether these people were attempting to form themselves into an association or partnership for the purpose of carrying on a business the object of which was the acquisition of gain by the company or association or by the individual members thereof. With regard to the first point, I should think that the object of this business was not the acquisition of gain to the association itself. Then can it be properly said that these persons attempted to form themselves into an association or partnership for the purpose of carrying on a business, and that the object of that business was the acquisition of gain by the individual members. I think that this was an association formed for the purpose of carrying on a business. It was formed for the purpose of carrying out a long consecutive number of transactions all of a similar kind and through a long period. It was therefore, to my mind, an association formed for the purpose of carrying on and was carrying on a business. And what business? The well-known business of insurance. True it was for mutual insurance, but I think it cannot be denied that it was formed for the purpose of carrying on business. We then have only to consider whether it was formed for the purpose of carrying on a business the object of which was the acquisition of gain by the individual members.

Now, what was the object of this association with regard to the individual members? They became really and substantially part insurers of the ships of all the other members; but that was not their object with regard to themselves, their object was not to become insurers without receiving anything. Their object was

C. A. 1882 *In re* PADSTOW TOTAL LOSS AND COLLISION ASSURANCE ASSOCIATION. Brett, L.J.

that, in consideration of their insuring other people's ships their own ships should be insured in case of loss. Therefore the object of the association was, with regard to each individual member, that he should be indemnified in case his ship was lost. The question, therefore, is reduced to this, whether it can be properly said that the business was being carried on by them for the purpose of gain. An individual member loses his ship, and he gets from his brother associates a sum of money, which partially indemnifies him for the loss. Given the loss of the ship, what he gets from them seems to me to be clearly a gain to him. Therefore the object of the association is that each member may acquire gain upon the happening of certain events. I think that this comes within the meaning of the 4th section, and that this therefore is an attempt to form a company, association, or partnership, which is prohibited by the 4th section, and accordingly that there never existed at any time any company, association, or partnership of which the law could properly take cognizance and with regard to which the Court could properly make a winding-up order.

After fully considering this matter, and hearing it argued as it has been argued to-day, I must confess that the inclination of opinion which I expressed with regard to mutual insurance companies, in the case of *Smith* v. *Anderson* (1), cannot, in my opinion, be maintained. It was not a point necessary to be decided in that case, as I took care to notice, but I expressed an inclination of opinion upon it which, after the full argument I have heard to-day, I do not now maintain.

I think, therefore, this order was erroneously made, and ought to be set aside.

LINDLEY, L.J.:—

I am of the same opinion, and I shall only advert to one or two points. The first point is, whether a mutual insurance society is within the 4th section of the *Companies Act* of 1862, that is to say whether, supposing it consists of more than twenty members, it must be registered. That depends upon the true meaning of the words "no company, association, or partnership, consisting of more than twenty persons shall be formed after the commence-

(1) 15 Ch. D. 247.

ment of this Act for the purpose of carrying on any other business," (that means any business other than banking) "that has for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof, unless it is registered, &c." The insertion of the words "by the individual members thereof" was occasioned by the decisions in *Reg.* v. *Whitmarsh* (1), and *Bear* v. *Bromley* (2), and was intended to get rid of the effect of those cases.

I do not regard this company or association as formed for the purpose of the acquisition of gain to the company as a whole; but when we come to ask ourselves whether it was formed for the purpose of carrying on a business having for its object the acquisition of gain to its members, we must be careful. The question assumes this shape—Is a diminution of loss a gain, within the meaning of the section?

If we looked at the question at the time when an insurance was effected we might say that the acquisition of gain was not the object, but if we look at it when the ship has gone to the bottom, and a loss has been incurred, the gain is obvious enough, because the owner gets back a large part of its value by the insurance. In that point of view the object of the insured is to acquire gain; from one point of view it is not, but from the other his object is to acquire gain in the sense of diminution of the loss which he would otherwise suffer. Looking to the language of the section, it appears to me that it is wide enough, and was intended to be wide enough to include all such associations as this, and that the language properly construed applies to such associations as the present.

The next question is what is the consequence of the association not being registered? The language of this Act is different from that of the previous Acts, which were passed between 1844 and 1862. The language of this section is imperative that no company consisting of more than twenty members shall be formed for the purposes therein mentioned, unless it be registered; when therefore such a company is not registered it is illegal in this sense, that it is a prohibited thing, and the law cannot take notice of it except, perhaps, in a penal point of view, which of course is

(1) 15 Q. B. 600. (2) 18 Q. B. 271.

C. A. 1882 *In re* Padstow Total Loss and Collision Assurance Association. Lindley, L.J.

a question which we are not now considering. Then the position of the petitioners is this, they take an assignment of a claim, an agreement to refer which to arbitration had been entered into between a member of this society and the society. An award was afterwards made, and upon that award the petitioners bring an action in the name of the assignor, the member of the association. Plainly, therefore, they cannot be in any better position than their assignor whose name was used by them in the action. Whether they would be in any better position if knowledge of the nature of the company were not to be imputed to them is a question of some difficulty; but I do not think that it arises here because these petitioners clearly cannot be in a better position than their assignor, who must have known all the circumstances. I have some little difficulty in following out the doubt expressed by Lord Justice *Mellish* in the *South Wales Atlantic Steamship Company* (1). If a man knows only of some fifteen or sixteen persons, as carrying on business together, and deals with them, he can sue them, and he can say "you have been trading under such a name and I will obtain an order to wind you up." I doubt whether they could escape by shewing that they were illegally associated with thirty or forty more persons of whom he had never heard. But if on discovering that such other persons were associated with them he were to sue, or to present a petition to wind up, the whole body, he would be in a difficulty, because he could not reach the other members without having recourse to the illegal contract to aid him in making out his case against those persons of whom he had never heard before. In the present case, however, it does not appear to me that anything can turn upon the question of knowledge, because it is quite plain these petitioners cannot be in a better position than their assignor. I am of opinion that this winding-up order ought never to have been made, and ought to be discharged.

Solicitors for Appellant: *Clarkson, Greenwell, & Wyles.*
Solicitor for Respondent: *G. E. Philbrick.*

(1) 2 Ch. D. 763.

H. C. J.

In re HAVEN GOLD MINING COMPANY.

C. A. 1881 V.-C. B. *Nov.* 19, 26; *Dec.* 3, 10, 20. C. A. 1882 *Jan.* 13, 14.

Company—Winding-up—Impossibility of carrying on Business—Just and equitable Cause for Winding-up—Majority of Shareholders desirous of going on—Fraud—Companies Act, 1862, *s.* 79, *sub-s.* 5 [*Revised Ed. Statutes, vol. xiv. p.* 220].

Where the Court is satisfied that the subject-matter of the business for which a company was formed has substantially ceased to exist, it will make an order for winding up the company, although the large majority of the shareholders desire to continue to carry on the company.

Therefore, where a company was established for working a gold mine in *New Zealand*, and it turned out that the company had no title to the mine, and had no prospect of obtaining possession of it, except as to a small portion for a few months, a winding-up order was made, although there were general words in the memorandum of association enabling the company to purchase and work other mines in *New Zealand*, and the large majority of the shareholders wished to continue the company.

But, *semble*, the mere fact of there having been fraud in the promotion of the company, or fraudulent misrepresentation in the prospectus, would not in itself be sufficient to induce the Court to make a winding-up order, because the majority of the shareholders would have power at a general meeting to waive the fraud and confirm the transactions affected by it.

The decision of *Bacon*, V.C., reversed.

THIS was a petition to wind up the *Haven Gold Mining Company, Limited*, under the following circumstances.

By an agreement dated the 15th of September, 1880, *F. W. Eicke* agreed to sell to the *Metropolitan and Provincial Land Corporation*, for the sum of £5000, all his mineral rights in two pieces of land in the *Thames Gold Field, Auckland, New Zealand*, therein stated to have been granted to *Eicke* by the *Maori* owners of the soil, by two indentures of lease dated the 30th of November, 1868, and the 14th of December, 1868, for the terms of fourteen and twenty years respectively; and it was agreed that in the event of a limited company being formed prior to the completion of the said purchase for the acquisition and working of the said mineral rights *Eicke* would, if required, accept £2000 of the said purchase-money in fully paid-up shares in such company.

By a second agreement, dated the 20th of December, 1880, *Henry Elliott*, the secretary of the corporation, on behalf of the corporation, agreed to sell the same mineral rights to *J. H. Hance*

C. A. 1882 — *In re* HAVEN GOLD MINING COMPANY.

for the sum of £16,000, of which £10,000 were to be paid in cash on the 17th of January, 1881, and the balance as soon as the title to the property should be proved; with a stipulation that if a limited company were formed the corporation would accept the balance of £6000 in paid-up shares.

By a third agreement, dated the 24th of December, 1880, *Hance* agreed to sell the same mineral rights to *W. R. May*, a trustee on behalf of a company then in course of formation, for the sum of £30,000, of which £20,000 were to be paid in cash on the 17th of January, 1881, and the balance of £10,000 in paid-up shares of the company. The last-mentioned two agreements were afterwards modified as to the mode of payment of the money.

The proposed company was registered on the 14th of February, 1881, under the name of the *Haven Gold Company (Limited)*, with a nominal capital of £100,000, in shares of £1 each; the main object being stated to be "To purchase, hire, lease, or otherwise acquire mines and mineral properties, lands, or hereditaments in *New Zealand* or elsewhere, or any estates, or interests in or rights or privileges over any such mines, &c., and more particularly to carry out the agreement of the 24th of December, 1880, between *J. P. Hance* and *W. R. May*, as trustee on behalf of the company, upon the terms and conditions therein mentioned."

A prospectus was at the same time issued, by which it was stated as follows: "The company is formed for the purpose of acquiring and developing the property called the '*Haven Claim*,' situate at the *Thames Gold Field, Grahamstown*, near *Auckland, North Island of New Zealand*."

"The mining rights acquired by the company are held on lease at a nominal rental of £40 per annum, but without royalty, and the documents relating to the lease were duly registered in the Native Lands Courts at *Auckland*."

The prospectus contained a chart of the property alleged to be purchased by the company, and referred to the reports of Professor *W. Vazie-Simons*, an eminent geologist and mining engineer, and Mr. *Rice*, formerly a justice of the peace in *New Zealand*, as to the great value of the property and the large profits that had been derived from the neighbouring gold-fields.

When the title to the property was investigated it appeared that the documents under which *Eicke* claimed were as follows:—

By a deed, dated the 30th of November, 1868, and made between a *Maori* native of the one part and *Eicke* of the other part, the native granted to *Eicke* and his assigns liberty and license to sink shafts for and tunnel for gold in every part of a block of land therein described for the term of fourteen years from the date of the deed, in consideration of the annual payment of £20, a sum of £2 having been paid at the time of the execution of the deed.

By another deed, dated the 14th of December, 1868, and made between two *Maori* chiefs of the one part and *Eicke* of the other part, the two natives demised to *Eicke*, his executors, administrators, and assigns, another parcel of land, for the term of twenty years, for mining purposes, at the annual rent of £20.

The parcels in these two deeds did not coincide with those in the prospectus chart, though they appeared to include part of them.

In October, 1871, *Eicke* obtained a confirmation of these grants and had the deeds of confirmation registered, and in January, 1872, sold or mortgaged his interest to Mr. *Dexter Brigham* for £300, who had the documents in his possession at the time when the company was formed.

In April, 1881, the company, for the purpose of claiming their title, bought up the interest of *Brigham* for £1000, and took an assignment of the property from him.

On the 7th of May, 1881, the directors received a telegram from *New Zealand*, informing them that *Eicke* had no title to the land, and that the portion comprised in the lease of the 14th of December, 1868, was in the possession of, and being worked by, a Mr. *Russell*. This was followed by a letter from their solicitors at *Auckland* (received the 19th of July, 1881) informing them that there was a prior registered title to the land comprised in the last-mentioned lease.

In the meantime, in consequence of the intelligence received by telegram, the directors called an extraordinary meeting of the company for the 31st of May. At this meeting the circumstances which had occurred were laid before the meeting, but the shareholders, by a large majority, declined to wind up the company,

C. A. 1882 *In re* Haven Gold Mining Company.

and passed a resolution that the directors should be authorized to deal with the questions which had arisen as to the title in such way as they might deem most advantageous to the company.

On the 21st of September, 1881, the present petition was presented, the Petitioners being *B. Trench*, a paid-up holder of £100 shares, and *Alfred Tucker*, a paid-up holder of fifty shares in the company.

The grounds on which they asked for the winding up of the company were that the company had no title to the property mentioned in the memorandum and prospectus; that it was promoted solely for the interests of the promoters, and could not be carried on to the advantage or profit of the shareholders; that many statements in the prospectus were untrue and misleading, and that the company was a mere bubble and a sham.

The petition came on on the 19th of October, 1881, but stood over from time to time until the 20th of December.

On the 13th of October the directors issued a circular to the shareholders stating their opinion that it was hopeless to go on with the undertaking, and advising that the company should be wound up voluntarily: and at the same time they summoned an extraordinary meeting for the 1st of November, 1881. At the meeting the following resolution was passed: "That in the opinion of this meeting there is no necessity whatever for the company to be wound up; that Mr. *H. E. Rice* ought to be sent out to *New Zealand* forthwith; that the meeting stand adjourned for five months, and all matters allowed to remain *in statu quo* until Mr. *Rice's* report has been received; and that this meeting wishes the Court of Chancery to dismiss the petition of Messrs. *Trench* and *Tucker* with costs."

This resolution was carried by an overwhelming majority, there being sixty-eight shareholders holding 9165 shares in favour of it, and four shareholders holding 250 shares against it.

The accountant of the company had furnished a financial statement, from which it appeared that the money received for shares amounted to £13,000, of which about £8000 remained in hand after payment of all liabilities.

The petition came on for hearing before Vice-Chancellor *Bacon*, on the 19th of November, 1881.

Higgins, Q.C., *Hemming*, Q.C., and *Beddall*, for the Petitioners, cited *In re Suburban Hotel Company* (1); *In re Diamond Fuel Company* (2).

Horton Smith, Q.C., and *Whinney*, for three shareholders, representing one-tenth of the whole capital, supported the application for winding up, and claimed to have the nomination of the liquidator.

Eddis, Q.C., and *E. Chitty*, for the company, opposed the petition.

They referred to *In re Langham Skating Rink Company* (3).

H. B. Buckley, for six shareholders holding 3182 shares, and

Marten, Q.C., and *Brodie Cooper*, for *Eicke*, also opposed the application.

Hemming, in reply.

Bacon, V.C.:—

This petition is presented solely on the ground of an alleged fraud committed by the promoters and projectors. It is so stated on the face of the petition, and it has been so treated during the argument in support. If the case be not one of plain fraud there is no case at all.

Now I have heard with some surprise the speeches which have been addressed to me in the attempt to support this case. In my opinion there is not a shadow of foundation for the imputation of bad faith or fraud which has been so plentifully made against the directors. They may have been over sanguine; they may have been misled; they may have conceived vast projects which have never been realized; but there is no fraud in that. If they misrepresented any facts to the shareholders they would have been open to an imputation of fraud. But there is not a word in the prospectus that has been effectually challenged. There is not a word of exaggeration or of persuasion by means of misrepresenta-

(1) Law Rep. 2 Ch. 737. (2) 13 Ch. D. 400.
(3) 5 Ch. D. 669.

C. A. 1882 *In re* HAVEN GOLD MINING COMPANY. V.-C. B.

tion. All that can now be said is that the promoters bought on a bad title. As to the successive transactions beginning with the purchase by *Eicke*, and ultimately coming to £30,000, which this company agreed to give for the property, I have not heard any objection to them, except that they are used as proof that an exaggerated value was placed on the property. I cannot undertake to say it was so. I know nothing about mining property or the value of it; but persons who do know about it did agree deliberately and regularly to enter into these several contracts. The price may have been a large one; it may have been too large; but where is the fraud in that?

Then it is said there is a bad title; but I do not know that. The scraps of documents which are referred to as exhibits do not give a very clear notion of the matter, except that the *Maori* owners agreed to the leases in terms which are stated by the directors to have been very advantageous in the year 1868. Mr. *Hemming* quarrels with the maps which are appended to those deeds. He says, they prove upon inspection that the diagram upon the prospectus is wrong; and that the directors have no title whatever to that which they describe on the plan accompanying the prospectus. But the lands are registered; they are in a country in which the register proves the position and identity of the lands, and if the maps were made out to be defective that would not at all touch the case I have before me. It seems that the present directors bought with an obscure title, but they have done their best to clear up that obscurity, and by payment of £1000 they got the documents of title into their possession.

I find no justification for the expressions in the petition that "Many statements in the prospectus are misleading;" and that "the said company is a mere bubble and a sham;" and it is a well-established rule in this Court, that if a man alleges a fraud practised by his opponent, and fails to prove it, his petition or application must be dismissed. Where do I find any bubble or sham? It is no bubble that the promoters bought the mining land; it is no sham that they paid £1000 for it; there was no sham in the various efforts they made to clear up the matter. But it is said, because they bought from *Brigham* his interest in the property for £1000 that the matter is, on the face of it, plainly fraudulent.

I repeat that there has not been a single fact proved in the case which justifies the expressions to which I have referred.

That is not all that is to be said. A meeting has been held, at which the whole matter was explained in the fullest manner. It was laid before the persons present, and they were invited to determine whether this obscurity in the title, subsisting as it did at the time, should be cleared up, and whether the sending out an agent to clear up these difficulties was expedient. The directors, it seems, were not at all unwilling to wind up voluntarily, but they did that which was proper to be done, they submitted the matter to the consideration of the shareholders. At the meeting, the present Petitioners, or persons representing them, were present, and a long discussion ensued. At length it was resolved by the shareholders present, knowing all that was being said against the directors, knowing all the difficulties that attended the prosecution of the project, that they were of opinion the matter should go on, and that the directors should continue to accomplish if they could the objects of the company. Then the Petitioners say that this resolution is a thing the Court ought not to attend to. Why not? The votes were counted, and a large majority were in favour of the resolution. But then the Petitioners say, "Yes, but a poll was demanded." The articles of association provide for the manner in which a poll can be properly or lawfully demanded, and no other can be resorted to. The poll was demanded by two or three persons, and the Petitioners say that the articles were fulfilled because these persons held in their pockets the proxies of some other persons. I desired to see the proxy papers, and I found that they authorize the persons to whom they are addressed to go to the meeting and there to vote for the persons granting the proxies. Can I read in that an authority to take so important a step as to demand a poll? Costs would attend such a proceeding. The proxy-maker would be astonished some day to be served with a bill of costs, and to be told he must pay it, because he made somebody a proxy to vote for him.

Upon the result of that meeting, in my opinion, every question of merits was wholly and completely concluded. The cases that have been referred to established as the law of the Court, that when it is not impossible to carry on the project, when it is not

C. A. 1882 *In re* HAVEN GOLD MINING COMPANY. V.-C. B.

absolutely clear that no good can ever come of the proceedings to accomplish the project, the Court will not interfere. Why should the Court interfere? I should have thought that it had been well enough settled that the Court never does interfere in the domestic affairs of companies. Here, in their own *forum*, with full information, with plenty of time for deliberation, hearing what everybody, including the Petitioners, or persons representing the Petitioners, had to say against it, they came to the determination to go on with the scheme.

Under these circumstances, in my opinion, it was a most unjustifiable proceeding to present a petition calling this project a bubble and sham, and the diligence which the Petitioners have used since, in ransacking all the documents produced by the company, and trying to build up arguments on a defect of title or something else which may have occurred to them, is an unfair, unjust, and unreasonable mode of dealing with the subject.

It is, I conceive, the duty of the Court, to discourage to the utmost of its power the presentation of such petitions as this. The Petitioners could have no honest object. There is no excuse in point of fact for the allegation of fraud on the part of the directors. All I can do on this occasion, whatever else can be done in some other way, is to dismiss this petition, and dismiss it with costs.

J. B. D.

C. A.

From this order the Petitioners appealed.

The appeal came on to be heard on the 13th of January, 1882.

Higgins, Q.C., and *Beddall*, for the Appellants:—

The petition is based on two grounds; first, that the whole scheme was a fraud and a sham; and, secondly, that the whole substratum of the company has failed, and that it cannot be carried on for the purpose for which it was established. Therefore, on either ground, it is "just and equitable" that it should be wound up: *In re London and County Coal Company* (1). We mainly rely on the second ground. The company was entitled to work a particular claim, and when the title to that claim is investigated it is discovered that they have no title to any part

(1) Law Rep. 3 Eq. 355.

of it, except, perhaps, a license to work a part of it till November, 1882. The fact that there were general words in the memorandum of association empowering them to acquire a title to fresh claims, and that a majority of the shareholders are willing to try their chance of doing so makes no difference. That was not the object for which the company was established: *In re Suburban Hotel Company* (1).

Eddis, Q.C., and *E. Chitty*, for the company:—

The company is not insolvent, and therefore the ground for winding it up must be either fraud or nothing.

[JESSEL, M.R.:—It is difficult for the Court to enter into the question of fraud on this petition when the promoters who are accused of it are not present. The real question is, whether there is a substratum for the company or not. Has the company a mine or any contract for a mine?]

The whole proceedings of the company have been *bonâ fide*. It is true that there has been a difficulty about the title, but the great majority of the shareholders are anxious to run the risk of going on with the adventure. It is admitted that we have a right to work part of the land till the 30th of November, 1882, and we believe that if we get a footing in the claim we shall be able to obtain other claims in the same gold-field, and realize a large profit. We have power by the memorandum of association not only to work the *Haven* claim but any others which we can obtain. Therefore the substratum of the company is not entirely gone; and in such a case the large majority of the shareholders ought to prevail. No one will be injured if the company is allowed to continue, for there are no creditors, and the company is perfectly solvent; and, on the other hand, if the company is wound up the shareholders may lose a great prospective benefit: *In re Diamond Fuel Company* (2); *In re Langham Skating Rink Company* (3).

Marten, Q.C., and *Brodie Cooper*, for *Eicke*, were not heard, as *Eicke* was neither a creditor nor a contributory of the company.

(1) Law Rep. 2 Ch. 737. (2) 13 Ch. D. 400.
(3) 5 Ch. D. 669.

C. A. 1882 *In re* HAVEN GOLD MINING COMPANY.

JESSEL, M.R.:—

This is a case, I cannot say altogether novel to me in some of its salient features, but it is certainly a very remarkable case. It appears that a person of the name of *Eicke* in the year 1868 had some conversation with a *New Zealand* savage, who could neither read nor write, and who is described in the documents to which I am going to refer as an illiterate person, and who apparently was unable to understand English, for that document was interpreted to him. What the *New Zealand* savage was entitled to does not appear, but a document called a deed is produced dated the 30th of November, 1868, and made between the New Zealander, who is described as an aboriginal native of *New Zealand*, of the one part, and *Frederick William Eicke* of the other part. [His Lordship then read the document, and proceeded:—]

Now, as I read that document, it is only what we call an exploring license—it is only a right to sink shafts for and tunnel for gold. There is no gift of the gold itself even to Mr. *Eicke*, and it does not even say that he is to retain the gold if he finds it, under the authority I have read "to sink shafts for and tunnel for gold." It is not an exclusive license, and therefore if this *New Zealand* savage was the owner of the property there was nothing to prevent his granting licenses to other people, and, as I said before, there is no grant of the gold itself to Mr. *Eicke*.

At or about the same time it appears that Mr. *Eicke* had another conversation with two New Zealanders who seem to have been in the same state as the other one as regards education, and another deed was executed, dated the 14th of December, 1868, and thereby, without any recital of any title at all, "in consideration of the rent thereinafter reserved these two chiefs granted a piece of land said to be about 3½ acres in the Gold Fields for £20 sterling a year for twenty years from the date for mining purposes." That is a grant of the land and the mine for that term, and there is a covenant for further assurance. The deed is said to have been interpreted to the chiefs who sign it with their marks. If the chiefs had a title it passed with the deed, but the chiefs appear to have been worse off than the other native, for they do not appear to have got anything. There was a rent reserved of £20 a year, and like the rent reserved to the other party it

appears by some subsequent documents that it was not paid. Those two documents are said to have passed to *Eicke* some property the value of which is incalculable. According to the prospectus they cover something like six or seven acres of gold reef of enormous value, worth I know not what; I must leave that to the imagination of the shareholders. That is the title which *Eicke* says he acquired in 1868. *Eicke* was not of a very adventurous spirit, he does not seem to have taken the trouble to register the title as was required by the law of *New Zealand*, and he did nothing. He has told us that he did not work under either of these titles, and he allowed this immense mass of gold, or gold reef, or gold ore, to remain unworked until in October in the year 1871 he obtained two other documents confirming the grants previously made, and he did get these two documents of 1871 registered. However, they conferred no further title, and they seem to have been made as deeds of confirmation for the purpose of registration. They were registered in 1871. [His Lordship then stated at some length the circumstances attending the formation of the company, and proceeded :—]

Well, that being the position of matters, the company is formed, as I say, for working this gold mine—that is, the gold mine under this land. When we come to look at the plan on the prospectus, I think it is pretty clear that the plan on the prospectus comprises a portion of that which is comprised in the first license. It comprises a portion if not the whole of that which is comprised in the lease, and it comprises some land between which is not either in the lease or license. It comes therefore to this, that a portion of the land described in the license, and a portion or the whole of the land described in the lease, are included in the plan. No doubt—and I have not forgotten it—there are general words in the memorandum and articles of association extending the right to work mineral property generally; but the object of the company, or the special object in the memorandum of association, is to work this gold mine; and the point which I have to consider is whether there is any mine at all as to which the company has a title or a contract which may eventuate in title. Now, if I am right as to the construction of the first document, even supposing the New Zealander who put his mark to it had any title at all, it would

C. A. 1882 *In re* HAVEN GOLD MINING COMPANY. Jessel, M.R.

not have passed anything of any value. The mere right of prospecting is not a very valuable right, because the more you find the harder are the terms imposed upon you. But, even assuming that the construction I have put upon the deed is not the correct one, and assuming that the prospecter is impliedly to keep any gold that he can find, it cannot be treated seriously as a title to work a mine represented as this was to the public, who are asked to subscribe with a notion of continuous working. The term expires in November, 1882, and, as I said before, it would not be sufficient in itself to be treated seriously as a title to a mine which the company could be supposed to work or which the public could be supposed to have subscribed to or to take shares in.

Therefore, passing from that, we have next to consider the middle piece, as to which it is clear there never was any title, and then I take the other piece, as to which the Maori chiefs may or may not have had a title. The evidence as to that stands in this way: The company having been formed and having made inquiry as to the documents of title, found they were in the hands of Mr. *Brigham*. They treated for them, and they eventually paid £1000 to get the documents away, and got an assignment from *Brigham* of his interest to the promoters, and then, as I said before, these facts, which I have stated, appeared. That being so, they found a very great difficulty about going on. It is plain, as far as regards a very large proportion of the property, it was held for a year—the fourteen years having nearly expired, and the residue for a term of which there were only seven years unexpired. Then they communicated with the shareholders, and it was agreed that Mr. *Rice*, one of the board, should go over to *New Zealand* to inquire and see what the title was. After this, I think it was in May, 1881, a telegram was received stating that what I called the "leased" part, as to which Mr. *Eicke* admits he never took any possession, was actually in the possession of and being worked by a Mr. *Russell*, one of the directors of the *New Zealand Bank*, and that on looking into the title it was found that he had a title earlier in date than *Eicke's* title, that is, *Eicke's* title of 1868, and registered before it, therefore it was doubly prior. As to the license, there was a prior registration of a subsequent title. As to the lease, there was both prior title in date

and prior registration and actual possession, and the telegram consequently stated that *Eicke's* title was bad. This was followed up by a letter of the company's solicitors, Messrs. *Hesketh & Richmond*, who are solicitors trusted by the company, and have been appointed their solicitors in *New Zealand*. Their letter arrived in October, and the result of that letter was to confirm the telegram. Therefore, by that time, the directors were aware that the last ray of title had disappeared.

Then, at the general meeting in May, the shareholders were informed what difficulties the company was in, and a resolution was passed empowering the directors to deal with the matter in the way they might think most conducive to the shareholders' interests. In pursuance of that resolution it was arranged that the company should send a gentleman to *New Zealand* to investigate the title.

However, the directors, when they sent out the circular of the 13th of October, 1881, signed by the chairman, Mr. *Fookes*, were satisfied with the letter from their own solicitor in *New Zealand*, which stated that the title of *Eicke* was bad and why it was bad, and they felt that it was hopeless to go on with it, and they recommended a winding-up voluntarily. I take the same view of it. I think it is satisfactorily proved in evidence that there was no title at all in *Eicke*, and no title which he could give to the company to any portion of this mine to be worked as a mine.

Well, then, is it to be tolerated that a majority of the shareholders of a company should bind the minority to go on when they have no title at all, merely because they think it possible they may get a title? Mr. *Rice's* instructions were only to make inquiries and to negotiate. At present there is no negotiation, there is no reasonable prospect of obtaining the mine from any one. Nobody says that the owners are willing to sell or willing to give extension of the leases—nothing at all about it—and therefore it simply comes before us in this position. There is evidence which is satisfactory to me, and I believe to the rest of the Court, that there is no title at all. There is evidence which is not only satisfactory to us but was quite satisfactory to the directors—the very same evidence on which they advised the shareholders to act, but the shareholders in general meeting over-

C. A. 1882

In re HAVEN GOLD MINING COMPANY.

Jessel, M.R.

ruled their directors, and in December last refused to act upon it, and insisted upon going on with the company. Then is not this exactly the case pointed out by Lord *Cairns* in *In re Suburban Hotel Company* (1), "where it is impossible to carry on the business for which the company was formed." It seems to me it is exactly that case.

I agree that the mere fact of there being a fraudulent representation or fraudulent representations in the prospectus is not sufficient. A company may, if they think fit, waive the fraud and complete the bargain and go on, or they may vary the bargain on the ground of fraud, and complete it with variations. As to that, the majority of the company in general meeting assembled are the best judges, but where the whole thing is gone the majority cannot bind the minority to enter into an entirely new speculation, and it never has been so held. I agree also with the argument put forward on the part of the Respondents, that it requires a very strong case to induce the Court to interfere, but if what I have said is correct, I think I may safely add that in my opinion this is a very strong case indeed, as strong a case as could very well be put to shew that what has been called the substratum of the company has no existence in fact, and, therefore, that the company's money, there being, as it appears, a very considerable sum of money to be dealt with, ought not to be applied to any such purpose as that which is suggested.

It seems to me that without going into any of the other topics which have been discussed, and which are very suggestive as to the mode in which these companies are got up and formed and advertised to the public, and as to the mode in which certain classes of speculators seem to grasp at anything, whether it is in the shape of substance or shadow, which has any relation even nominally to that attractive word "gold," without discussing those points, we have here a plain case of utter failure, and a plain case in which the Petitioners have a right to say, "Stop, divide what you have between those entitled to it, and do not involve me in a further speculation which I never consented to be a party to, and which can never be beneficial to anybody." It seems to me, for these reasons, an order ought to be made on this petition to wind

(1) Law Rep. 2 Ch. 737.

up the company, and the usual order as to costs I am afraid must follow. The usual order is that the Petitioners get their costs, which must be paid by the company.

BRETT, L.J.:—

In this case the company was formed for the purpose of working for gold under an alleged plot of land in *New Zealand*. The majority of the company desire to continue the scheme, the minority desire to wind up compulsorily. The company is not insolvent. Under such circumstances, it appears to me that the Court cannot interfere, unless there is within a reasonable meaning of such a phrase a total absence of the possession or right to possession by the company of the subject-matter which the company was formed to work, and no reasonable prospect of the company obtaining possession of such subject-matter; I have used the phrase that "within a reasonable meaning there should be a total absence of the possession or right of possession by the company of the subject-matter," for this reason, that it seems to me, if it were true that a mere minute portion of the subject-matter was in the possession of the company for an extremely short period, nobody could allege from that mere fact that there was not within a reasonable meaning of the phrase a total absence of the possession or right of possession by the company of the subject-matter. If, therefore, Mr. *Eddis's* points were correct, that as to a small portion of this alleged plot of land there was a right to work the gold under that small portion for a limited time, namely, for a time which does not extend for longer than a year, even if that were true, nobody would say that, nevertheless, there was not within any reasonable and business meaning of the phrase a total absence of possession of the subject-matter which this company was formed to work.

Now it seems to me that the Court ought not to interfere, unless the proposition which I have enunciated can be fulfilled by the evidence. If that proposition can be fulfilled, it seems to me to be immaterial whether there was fraud or not, either in the directors or promoters of the company. Fraud in the directors or promoters, to whatever extent it existed, would not without more entitle the Court in this case to wind up the company com-

C. A. 1882 *In re* HAVEN GOLD MINING COMPANY. Brett, L.J.

pulsorily, if the proposition which I have enunciated cannot be fulfilled. It therefore seems to me to be unnecessary for us judicially to determine whether there was any fraud in any of the promoters of this company or in the directors, but with regard to the directors, having, as I always have, a hatred of fraud in business men, I desire to state that I am not prepared to say at all that there was any fraud on the part of the directors of this company, but it seems to me that their conduct is open at present to the explanation that they were deceived.

With regard to certain other persons who may be said to have been promoters I make no observation. [His Lordship then referred to the facts of the case as shewing that the company would get no title to the *Haven Gold Mine* through *Eicke*, and proceeded:—] To my mind it is clear that the proper inference from the facts was that *Eicke* had himself no title. That inference was so strong that it immediately had its effect upon the minds of the directors of this company, and upon receiving information of the facts, and the opinion of their own solicitors in *New Zealand*, they came to the opinion, and I can see no evidence that they ever departed from it, that their case was hopeless, that they had nothing upon which this company could properly continue to act. They therefore advised their shareholders that the case was hopeless, and that the company ought to be wound up. I entirely agree with them that the case was hopeless. But then it was said that Mr. *Rice* was sent out to inquire whether their opinion was right, and to make, if he could, an arrangement by which persons who had claims should give up those claims to the company; that is to say, in other words, first of all he was to see whether the solicitors were mistaken, for which I see no colour; and secondly, he was to make a new arrangement with persons who were really entitled. Is there any reasonable prospect of his making such an arrangement? It seems to me that there is none. It is hopeless to suppose that he could make a new arrangement for this company with persons who are already working the plot, and working it for the same purpose as that for which this company was formed. I think, therefore, the proposition is made out that there was a total absence of possession or right of possession by the company of the subject-matter which they were formed

to work, and that there is no reasonable prospect of the company obtaining possession of such subject-matter. Under those circumstances it seems to me that the opinion of the majority of the shareholders is an unfounded opinion, and having come to that conclusion of fact, I think the opinion of that majority ought not to bind the minority. With regard to the alleged frauds by the promoters, it seems to me unnecessary to give an opinion. My own strong conviction is that the more Mr. *Higgins* could have made out the fraud on the part of the promoters, the less he could have supported the second proposition which he laid before the Court, because if there was fraud on the part of the promoters in increasing the price from £5000 to £30,000, the less would the company have been obliged to pay.

LINDLEY, L.J.:—

I also am of opinion that this company ought to be wound up, and I have come to that opinion with my mind fully alive to the difficulty of deciding questions of probability or improbability of success as against the views of the majority of the shareholders. What we have to consider is this, what are the respective rights of the majority and the minority of shareholders under those circumstances which have been proved in evidence before us? I do not propose to go through the facts at any length; but in substance what strikes me is this, that this company was formed for the purpose of acquiring and working the mine of which we have heard so much. The company was formed for the purpose of acquiring and working this mine, and upon the representation that they could acquire this upon certain terms. Neither the company nor their officers have had possession of this alleged mine, nor can they get possession at present; at all events, they have never had it, and they cannot therefore work the mine in the manner in which it was intended. The evidence satisfies me of this, that although, of course, for anything I know, negotiations with other claimants may result in the purchase or acquisition of the mine, there is no evidence whatever of any agreement by which the company can get this property. The evidence as it stands is, that they have not got it and cannot get it; it is a pure matter of speculation as to whether they can get it or not from other

C. A. 1882 *In re* HAVEN GOLD MINING COMPANY. Brett, L.J.

people; but that is not a matter on which it appears to me the minority are bound to embark. They may say, "No, that is not a speculation into which we entered, and we are not bound to embark in any such matter." It appears to me in substance to come to this, that it is proved by evidence upon which we must act, that the minority have established such a case as entitled them to say to the majority, "The undertaking in which we all embarked is proved to be impossible to carry out; we decline to enter into any further speculation, or to join you in trying to get this property from other people and upon other terms."

Upon that strict ground I think that the minority are entitled to say we insist upon a winding-up. The directors are themselves satisfied upon their own inquiries that it is hopeless to go on. It is not a controversy now as to whether there ought to be a compulsory winding-up as distinguished from a voluntary winding-up, because the majority do not want a winding-up. They say "No, we will go on in the speculative hope of getting this property somehow or other." I think the minority are not bound to embark in any such speculation as that. The majority not wanting to wind up voluntarily, but wanting to go on, the minority are entitled to say, "It is time to stop, and we are entitled to stop, the company." I am of opinion that they are right, and that it ought to be stopped. There will be the usual winding-up order.

Solicitors: *Beall; Harrisons; Preston & Co.*

M. W.

In re GERMAN DATE COFFEE COMPANY.

C. A.
1882
KAY, J.
Feb. 15.
C. A.
Feb. 24.

Company—Winding-up—Impossibility of carrying on Business—Failure of Object of Company—"Just and Equitable Cause" for Winding up—General Words in Memorandum of Association.

The memorandum of association of a company stated that it was formed for working a German patent which had been or would be granted for manufacturing coffee from dates, and also for obtaining other patents for improvements and extensions of the said inventions or any modifications thereof or incident thereto; and to acquire or purchase any other inventions for similar purposes, and to import and export all descriptions of produce for the purpose of food, and to acquire or lease buildings either in connection with the above-mentioned purposes or otherwise, for the purposes of the company.

The intended German patent was never granted, but the company purchased a Swedish patent, and also established works in *Hamburg*, where they made and sold coffee made from dates without a patent. Many of the shareholders withdrew from the company on ascertaining that the German patent could not be obtained; but the large majority of those who remained desired to continue the company, which was in solvent circumstances.

A petition having been presented by two shareholders:—

Held (affirming the decision of *Kay*, J.), that the substratum of the company had failed, and it was impossible to carry out the objects for which it was formed; and therefore that it was just and equitable that the company should be wound up, although the petition was presented within a year from its incorporation.

The effect of general words describing the objects of a company in the memorandum of association considered.

THIS was a petition for winding up the *German Date Coffee Company, Limited.*

The company was registered on the 16th of February, 1881, with a capital of £100,000, in shares of £1 each. By the memorandum of association the objects of the company were stated (so far as they are important for the present report) to be—

1. To acquire and purchase, and to use, exercise, and vend certain inventions for manufacturing from dates a substitute for coffee, for which a patent has or will be granted by the Empire of *Germany* to *Thomas Frederick Henley;* and also to acquire and purchase any other patents or privileges which may be granted to the said *Thomas Frederick Henley*, his executors, administrators, or assigns, by the said Empire of *Germany*;

C. A. 1882

In re German Date Coffee Company.

2. To make and use the said inventions, or any improvement therein, or modification thereof;

3. To adopt and carry out a certain agreement, dated the 16th of February, 1881, and made between the *Date Coffee Company, Limited*, of the one part, and *Richard Hillier*, for and on behalf of the company, of the other part;

4. To manufacture and sell the preparations which are the subject of the inventions;

5. To grant licenses for the manufacture of the said preparations and the sale thereof;

6. To apply for and obtain patents for improvements in or extensions of the said inventions, or any modifications thereof, or any matters in any way incidental thereto;

7. To acquire by purchase or otherwise, and to use, exercise, and vend any other inventions for the above-mentioned or cognate purposes;

8. To import all descriptions of produce for the purposes of food, and the exporting of the same, and the selling and disposing thereof respectively; and to acquire by purchase, or to lease or hire any land and buildings, steam-engines, &c., either in connection with the above-mentioned purposes or otherwise, for the purposes of the company or any company in the formation of which the company may have an interest.

The agreement of the 16th of February, 1881, referred to in the memorandum, was for the sale by the *Date Coffee Company* to *Hillier*, for £50,000, to be paid partly in cash and partly in shares of the *German Company*, of the rights, which the *Date Coffee Company* had, by an agreement dated the 17th of January, 1881, purchased from *T. F. Henley*, in certain patents for the invention of making from dates a substitute for coffee, which had been or should be obtained by him in the Empire of *Germany*.

The *German Company* issued a prospectus in which it was stated that the company was formed for the purpose of purchasing and working *Henley's* German patent at *Frankfort*, to manufacture a partial substitute for coffee from the date fruit. On the prospectus was printed what professed to be a copy of the articles of association, in which the first object of the company was stated to be "to acquire and purchase, and to use, exercise, and vend certain

inventions for manufacturing from dates a substitute for coffee, for which a patent has been granted by the Empire of *Germany* to *T. F. Henley*," &c.

At the time when the company was formed *Henley* had applied for a patent in the Empire of *Germany* for his inventions, but such patent was never granted.

In consequence of this misrepresentation some of the shareholders surrendered their shares, amounting in number to about 27,000, and withdrew from the company.

On the 12th of October, 1881, another agreement was entered into between the *German Company* and the *Date Coffee Company*, by which, after reciting that the German patent had been refused, but that the company were presenting an appeal from such refusal, the agreement of the 16th of February, 1881, was varied by the *Date Coffee Company* agreeing to grant to the *German Company*, in addition to the German patent, if obtained, the right to use the inventions patented by the English patent in *Germany*, and also to assign to them their Swedish patent in the same inventions; and it was agreed that on the completion of such grant and assignment the £50,000 payable under the former agreement should become payable either in cash or shares, at the option of the *Date Coffee Company*.

This agreement was brought before a meeting of the shareholders on the 13th of October, and was sanctioned by a majority representing 8979 shares against 2075.

Two actions by dissentient shareholders were brought to restrain the company from carrying the agreement into effect, which were still pending.

The *German Company* had expended £3000 on a manufactory at *Hamburg*, and it was stated that they were carrying on a very profitable business there in making coffee from dates, though without any German patent.

The appeal against the refusal of the German patent was unsuccessful.

On the 30th of January, 1882, this petition was presented by two shareholders, one of whom was the holder of 100 shares and the other of 10 shares, praying for the winding-up of the company on the ground that its objects had entirely failed.

C. A.
1882
In re GERMAN DATE COFFEE COMPANY.

The company, in opposition to the petition, produced an affidavit by Mr. *Gardiner*, a patent agent, that the application for a patent in *Germany* had been renewed on the 21st of September, but it did not state what the result of the application was. The petition was heard before Mr. Justice *Kay* on the 15th of February, 1882.

Romer, Q.C., and *Beddall*, in support of the petition :—

The object for which this company was formed was for working a patent in *Germany*, which was to be obtained to manufacture coffee from dates. That was the main object or substratum for which the shareholders subscribed their money, and the German patent cannot be procured. They never joined the company for the purpose of manufacturing date coffee without a patent. This brings our case within *Baring* v. *Dix* (1), where it was no longer possible to carry on the business for which the partnership was formed. In *In re Suburban Hotel Company* (2), Lord *Cairns* said, "If it were shewn to the Court that the whole substratum of the partnership, the whole of the business which the company was incorporated to carry on has become impossible, I apprehend that the Court might, either under the Act of Parliament or on general principles, order the company to be wound up." This company ought, therefore, to be wound up, notwithstanding that a majority of the shareholders may be in favour of continuing the company. At the meeting of shareholders the intention there expressed was to carry on the company for the sale of the article to be manufactured without a patent, and to work a patent obtained in *Denmark*, but those objects are not within the powers of this company. The recent case of *In re Haven Gold Mining Company* (3) is strongly in our favour.

Whitehorne, Q.C., and *Cecil Tennant*, for shareholders representing 3353 shares, in support of the petition.

Ince, Q.C., and *Buckley*, for the company :—

We are carrying on the business of the company within the scope of the agreement, and with the approbation of a very large

(1) 1 Cox, 213. (2) Law Rep. 2 Ch. 737, 750.
(3) *Ante*, p. 151.

majority of the shareholders. The company is empowered to work certain inventions for manufacturing coffee from dates in *Germany*, and this we may do without obtaining a patent in *Germany*. Then we are empowered "to make and use the inventions or improvements or modifications thereof," and further to manufacture and sell the preparations, and to acquire and use, exercise, and vend any other inventions for the above-mentioned or any other cognate purposes, and to import all descriptions of produce for the purpose of food, and export the same respectively. And we have power to purchase land and buildings in connection with the objects of the company. So that in fact there are many objects which we may invest the money upon, without carrying out to the full extent all the purposes for which the company was formed. The case of *In re Langham Skating Rink Company* (1) is an authority in our favour, where a winding-up order was refused on the ground that the company intended to carry out a small portion only of the original object for which it was formed. *In re Middlesborough Assembly Rooms Company* (2) also supports this view. There the company proposed to carry out only a part of the original object, and four-fifths of the shareholders opposed a winding-up, and Lord Justice *James* said: "We ought not to disregard the wishes of so large a majority unless we see in their conduct something unreasonable, something like tyranny, something amounting to an injury of which the minority have a right to complain." At the meeting held by this company shareholders representing 8979 shares supported the resolution to continue the business, while the minority represented only 2075 shares. The company had not been established a year before the petition was presented, and the Act contemplates that the company should have a year to perfect their arrangements.

Freeman, for persons representing 9980 shares, opposed the winding-up.

Romer, in reply.

KAY, J.:—

In this case the petition is presented by two shareholders of the

(1) 5 Ch. D. 669. (2) 14 Ch. D. 104, 109.

C. A. 1882 *In re* GERMAN DATE COFFEE COMPANY. Kay, J.

company, one of whom holds 100 shares and the other ten, for a winding-up of the company, and it is supported by a sufficient number of shareholders to make me quite sure that the application is a thoroughly *bonâ fide* one. On the other hand, it is opposed by the company and by a considerable body of shareholders. It does not appear that the company has passed any special resolution to wind up, but the clause upon which the application is made is the 5th sub-section of sect. 79, which is worded thus: "Whenever the Court is of opinion that it is just and equitable that the company should be wound up."

About the law which I have to apply to this case there really can now be no kind of doubt. Long ago, in the case of *Baring* v. *Dix* (1), the Court decided it would dissolve a partnership where it appeared that the business could not be carried on according to the true intent of the partnership articles, although one partner objected. In that case the partnership had been instituted for spinning cotton under a patent. The patent existed, but after several attempts the invention wholly failed, and was entirely given up. One of the partners declined to assent to the dissolution, whereupon an inquiry was directed whether the co-partnership business could be carried on according to the true intent and meaning of the articles of co-partnership. Those words are very important; they were referred to by Lord *Cairns* in the *Suburban Hotel Company's case* (2), in which he gave a very valuable judgment upon what jurisdiction the Court has, to order a winding-up under the 5th sub-section of clause 79, when the circumstances do not bring the case within the other sub-sections. He refers to the case of *Baring* v. *Dix* with approbation, and he says (3): "Now if I may venture to say so, I entirely concur with the course which was there taken. That was a case which manifestly required the interposition of the Court. Two persons had agreed not to manufacture cotton generally, but to join in working under a particular patent. The sole object was to work under a patent supposed to be valid at the time that the partnership was entered into. It turned out to be wholly invalid, and wholly useless. There was therefore a complete destruction of the subject-

(1) 1 Cox, 213.
(2) Law Rep. 2 Ch. 737.
(3) Law Rep. 2 Ch. 744.

matter on which the partnership was to operate. If the Court were satisfied that that was the fact, I apprehend that it would be entirely competent to the Court to dissolve the partnership against the will either of the majority, or, as the case there was, of one of two partners." Then he refers to certain other cases, and finally at page 750 he says this: "It is not necessary now to decide it, but if it were shewn to the Court that the whole substratum of the partnership, the whole of the business which the company was incorporated to carry on has become impossible, I apprehend that the Court might, either under the Act of Parliament or on general principles, order the company to be wound up. But what I am prepared to hold is this, that this Court, and the winding-up process of the Court, cannot be used, and ought not to be used, as the means of evoking a judicial decision as to the probable success or non-success of a company as a commercial speculation."

There came later before the Court of Appeal another case which was decided upon the same principle, the *Haven Gold Mining Company* (1). By the memorandum of association of that company it was stated that the objects for which the company was established were to purchase, hire, lease, and otherwise acquire mines and minerals, property, lands, or hereditaments in *New Zealand*, or elsewhere, or any estate, interests, rights, or privileges over any such mines which may be deemed necessary or advisable for the purposes of the company, and more particularly to carry out an agreement of the 24th of December, 1880, between *Hance* of the one part, and a trustee for the company of the other part; then to hire machinery to work and maintain the works of the company, to erect or hire smelting works, and to purchase ores from other persons, and other mines and mining companies, and to manufacture, smelt and dress such ores, minerals, and produce, to subscribe to any undertaking, offering facilities for the purpose of the company, to hold shares in companies, to acquire patent rights, to lend money on deposit, and so on. The terms of the memorandum were, "To purchase, hire, lease, or otherwise acquire mines and mineral properties, lands, and hereditaments in *New Zealand* or elsewhere," and in particular to carry out a certain agreement. It turned out that

(1) *Ante*, p. 151.

C. A. 1882

In re GERMAN DATE COFFEE COMPANY.

Kay, J.

the so-called agreement was utterly valueless, being an agreement to hand over a concession which in point of fact was no concession; and the Court of Appeal determined in that case, where the objects of the company were far wider than they are here, that as the agreement entirely failed, and the company was not in fact, as I gather, carrying on or attempting to carry on any other business, but was trying to better their original concession, and so to acquire the mine which the agreement really did not give them, that practically the whole substratum of that company had failed, and following entirely (as I understand their judgment) Lord *Cairns' dictum* in the *Suburban Hotel Company's case* (1) they considered that the substratum had in fact completely failed, and the company ought to be wound up; and the Master of the Rolls in his judgment says: "I have not forgotten there are general words in the memorandum of association extending the right to work mineral property generally, but the object of the company, or the special object in the memorandum of association, is to work this gold mine, and the point we have to consider is whether there is any mine at all as to which the company has a title, or a contract which may eventuate in a title." Then he says later on that he thinks there was no title, and he says: "Well, then, is it to be tolerated that the majority of the shareholders shall bind the minority to go on when they have no title at all, merely because they think it possible they may get a title?" And then he refers to instructions given to the person who was to negotiate, and says: "At present there is no negotiation and no reasonable prospect of obtaining the mine from any one."

Therefore the law so far is established thus, that if the whole substratum of the company is gone, it is within sect. 79 "just and equitable" that the company should be wound up. But then on the other side of the line comes the *Langham Skating Rink Company*, and that case shews where the line is to be drawn. There the object of the company was the construction or adaptation of any building or premises as a skating rink, club, house, or place of public or private entertainment, and there was no special agreement mentioned in the memorandum, and no particular property pointed at, but there was afterwards by a prospectus a statement that a site had been purchased facing the *Langham Hotel*, and

(1) Law Rep. 2 Ch. 737.

that when the block was pulled down a rink would be erected upon it. That scheme failed, and the company determined to do something much less than their original scheme; namely, to build, not the original rink, but a small rink upon a portion of the premises which they had acquired, and which could be done at less cost, and the shareholders applied to have the company wound up. In that case the company were actually doing that which the memorandum contemplated, there was no ground for saying that the main purpose contemplated by the memorandum had failed at all. The attempt there was to make out that the main purpose—the whole substratum of the company—had failed. That argument did not succeed, because what the company were doing was strictly in every sense of the word in conformity with the memorandum, and although it was a less thing than they intended to do originally, as the prospectus shewed, still the question, whether it was to be done or not, was precisely one of those questions on which the majority of the company had a right to bind the minority. I think that shews very plainly where the line is to be drawn, and I take the line to be this, that where on the face of the memorandum you see there is a distinct purpose which is the foundation of the company, then, although the memorandum may contain other general words which include the doing of other objects, those general words must be read as being ancillary to that which the memorandum shews to be the main purpose, and if the main purpose fails and fails altogether, then, within the language of Lord *Cairns* in the *Suburban Hotel Company's case* (1), and within the decision of *Baring* v. *Dix* (2), the substratum of the association fails.

With that understanding of the law I come to the question which I have to decide here, which is a question so near the line that it is a little troublesome to decide upon which side of the line it comes. In this case the name of the company is the *German Date Coffee Company, Limited*, and the name seems to me to be rather material in determining what the real object and purpose of the company was. The memorandum states the objects of the company to be "to acquire and purchase, and to use, exercise, and vend certain inventions for manufacturing from dates a

(1) Law Rep. 2 Ch. 737. (2) 1 Cox, 213.

C. A. 1882 *In re* German Date Coffee Company. Kay, J.

substitute for coffee, for which a patent has or will be granted by the Empire of *Germany*." I pause there, because it has been said that may be read in two ways—that you may read the first part as meaning to acquire an invention, and the rest of it as a merely incidental statement that a patent will be granted. Of course the observation occurs at once that it is one thing for the company to work in *Germany* a German patent, and a very different thing to form a company to work in *Germany* an invention for which there is no patent, and I have no doubt whatever that this first clause of the memorandum means to acquire and purchase a patented invention, an invention for which a patent has been or will be granted. Reading the whole of that clause together, I have no doubt at all it means to purchase and work an invention patented in *Germany*. The other words also seem to me to confirm that meaning, because the same clause goes on, "and also to acquire and purchase any other patents or privileges which may be granted to *Henley* by the Empire of *Germany*;" so that I read the first clause as being a clause which makes at any rate the first object of the company the acquisition and working of an invention patented in *Germany*. Then the second is this, "to make and use the said inventions." What are the said inventions? They are the inventions patented in *Germany*, or improvements thereon, or modifications thereof. It is said, if I read the second clause as meaning patented inventions, it is tautologous and useless. I admit there is a certain amount of tautology, but it is not entirely useless, because there is a sufficient purpose for the second clause in those words, "or any improvement therein or modification thereof," and I think that is the meaning. I should be slow to say that this second clause means to make and use the said inventions, whether patented or not, which is the construction it is argued I ought to adopt, because it would be very easy if that was the meaning to say so in unmistakable words, and without plainer words I do not think myself at liberty to consider the clause as meaning to use the said inventions whether they are patented or not. Then what follows in the third clause is, "to adopt and carry out a certain agreement," which is described, and to which I will refer presently. The fourth is, "to manufacture and sell the preparations which are the subject of the said inventions,

or any or either of them." That *primâ facie* means to manufacture and sell the preparations which are the subject of the patented invention. I think that ambiguity, if ambiguity there is, is removed by the fifth clause, which clause is to this effect: "to grant licenses for the manufacture of the said preparations:" clearly shewing that the draughtsman, by "preparations," meant preparations made under the patent. The sixth is, "to apply for and obtain patents for improvements in or extensions of the said inventions, or any modification thereof, or any matters in any way incidental thereto." The seventh is, "to acquire, by purchase or otherwise, and to use, exercise, and vend any other inventions for the above-mentioned or cognate purposes." Then the eighth is, "to import all descriptions of produce for the purposes of food, and the exporting of the same respectively from such countries and the selling and disposing thereof, and to acquire and obtain by purchase, or to lease or hire, and so on, any land and buildings, &c., in connection with the above-mentioned purposes, for the purposes of the company or any company in the formation of which this company may have an interest." Then, to sell, lease, or otherwise dispose or mortgage the patent rights, lands, premises, &c., of the company, and to invest the capital of the company in building on these lands, and so on. As no stress has been laid upon any of the subsequent clauses of the memorandum, I need not read them further.

I cannot really doubt that the meaning of this memorandum is that the first purpose, the main object of the company, is to acquire an invention patented in *Germany*, and to work that invention, and that it is not to acquire an invention which is not patented, and if I had any doubt I am at liberty to look to the agreement mentioned in the memorandum in order to clear up that doubt, and when I look to the agreement I find it was made the same day the company was formed, and is between another company, an English company, which had been formed to work an English patent for the same invention, and one *Hillier*, as trustee for what is called the *German Date Coffee Company*. After reciting that *Henley* had applied for a German patent, the agreement witnesses "that *Hillier* shall purchase from the *English Date Coffee Company* the said letters patent in and for the Empire of *Germany*,

C. A. 1882 *In re* GERMAN DATE COFFEE COMPANY. Kay, J.

and also all improvements, if any, which may be thereafter made or discovered therein, or additions thereto, and the benefit of any further letters patent which may be obtained for such improvement, and any extensions thereof," and the consideration for the said purchase was to be £50,000. There is nothing in this agreement I believe which gives to the *German Date Coffee Company* anything in the nature of license or power to work this invention, supposing the *English Company* could give such a right without a patent in *Germany*. The whole thing contemplates the assignment for £50,000 to the *German Date Coffee Company* of a patent procured or to be procured in *Germany* for a particular invention, and any subsequent patent that might be obtained for improvements in *Germany*. Looking at that, I cannot doubt for one moment what the meaning of this memorandum was. They had no agreement whatever to work any invention in *Germany* except the German patent. That was the thing which was comprised in the agreement mentioned in that memorandum. Afterwards there were attempts made to get the patent in *Germany*, which did not succeed. There can be no doubt now, if ever there was any doubt, since the judgment in the case of the *Ashbury Railway Carriage Company* v. *Riche* (1), what is the effect of the memorandum of a joint-stock company. Lord *Cairns*, in his judgment in that case, to which we have so often had to refer, says this (2): "With regard to the memorandum of association, your Lordships will find, as has often already been pointed out, although it appears somewhat to have been overlooked in the present case, that that is as it were the charter, and defines the limitation of the powers of a company to be established under the Act. With regard to the articles of association, those articles play a part subsidiary to the memorandum of association."

Therefore I must look to the memorandum and the memorandum only, to know what is the charter of the *German Date Coffee Company*, and what are the objects and purposes of its formation.

Passing on from the first agreement it seems that other agreements from time to time were made, and I notice incidentally, not in the least as influencing the conclusion to which I come, but for the purpose of giving a narrative of what took place, that a

(1) Law Rep. 7 H. L. 653. (2) Law Rep. 7 H. L. 667.

prospectus was issued in February, 1881, which began by stating, "The company is formed for the purpose of purchasing and working *Henley's* German patent at *Frankfort*, to manufacture a partial substitute for coffee from the date fruit," and the prospectus had printed upon it what was alleged to be a copy of the memorandum of association of the *German Company*, but instead of stating the first object in the terms of the memorandum, it stated the object to be "to acquire and purchase and to use, exercise, and vend certain inventions for manufacturing from dates a substitute for coffee, for which a patent has been granted by the Empire of *Germany*." It seems because that statement was not true many shareholders applied to be relieved from their contracts as shareholders, and the company felt themselves bound to accept the surrender of a great number of shares. After that, as there was some difficulty in obtaining a patent from *Germany*, modifications of the agreement were made, one dated the 13th of May, 1881, which I need not dwell upon, when they contemplated that letters patent would be eventually granted by the Empire of *Germany*, and another agreement, which I must refer to. It seems by that agreement, dated the 12th of October, 1881, which was made between the *English Company* of the one part, and the *German Company* of the other part, after reciting what had taken place and the efforts to obtain a patent in *Germany*, it was agreed between the parties that the *English Company* should grant to the *German Company* "the sole use and exclusive license, power, and authority, so far as they can grant the same, to make, use, manufacture, sell, lease, license, or let, in and for the Empire of *Germany* all the inventions patented for and in the Kingdom of *Great Britain* and *Ireland*." What power had the *English Company* to grant the English patent to be used in *Germany?* The English patent gives them no exclusive right to use the invention in *Germany*, and without any such attempted license the *German Company* might have used the invention in *Germany* as much as they liked. Then it went on: "The company shall if and when the result of the appeal against the refusal to grant such letters patent shall ultimately be successful, and the said letters patent be granted and issued to the company, forthwith duly assign and make over the same to the *German Company*."

C. A. 1882 *In re* German Date Coffee Company. Kay, J.

Then it provides that the company shall duly assign to the *German Company* all or any patents now or hereafter to be applied for without any payment whatever, and then that they would assign to the *German Company* at once the Swedish patent and all rights possessed or enjoyed by them by reason of the possession or ownership of such Swedish patent, and that the *German Company* should upon the execution of the grant mentioned in clause 1 (which, so far as I understand, was a perfectly nugatory grant) and the assignment mentioned in clause 4 (which was the assignment of the Swedish patent), for the same invention pay the sum of £50,000. That agreement it seems was brought before a meeting of the shareholders, and at that meeting sanction was obtained to the agreement upon the 13th of October. There were 8979 votes for adopting the agreement and 2075 against it, and it bound the company to pay £50,000 for a perfectly nugatory grant of a license to use an English patent in *Germany*, and for the assignment of a Swedish patent which would be of no more use in *Germany* than an English patent. Two actions were brought to restrain the company from entering upon the agreement, and the company, upon an interlocutory motion, undertook not to carry out any part of that agreement.

What remains is this. It is said the company have works in *Hamburg*, which they acquired when they hoped to obtain the German patent, and that there they are carrying on some manufacture of date coffee, but of course not under a German patent, because they have not got the German patent. I must add to the narrative which I have given up to this point, that the hope of getting the German patent seems to be very small, because the appeal against the determination not to grant it has been tried and has failed, and I do not know that there is any further appeal possible. Therefore I must take it upon these materials that it is entirely out of the question that any German patent can be obtained.

Now the question is under which class of authorities does this case come. Does it come under the class of which the *Langham Skating Rink* is an example, or under the class of which the *Suburban Hotel* and the *Haven Gold Mining Company* are examples? I must answer that by these considerations. Here it is beyond all

question that the German patent is not, and I must take it now cannot be obtained. Certainly, according to the memorandum of association of this company, the acquisition of a German patent and working under it was the main and principal object of the existence of this *German Date Coffee Company*. Any other thing in the memorandum, if there be any, seems to be subsidiary and auxiliary only to that object of working a German patent. Therefore it seems to me that the case comes within the *Suburban Hotel Company's case* (1) and the *Haven Gold Mining case* (2) rather than that of the *Langham Skating Rink* (3), and that this is a case in which that which is, or rather was to be, the substratum, the main object of the company, to which all other objects are merely subsidiary and auxiliary, namely, the obtaining of a German patent for a particular invention, has completely failed. Therefore it seems to me that it is a case in which it would be beyond the purposes of this company to carry on the business which they now propose to carry on, and that I ought to regard the wish of the minority, who say we decline to be involved in the carrying on of a business which was really not contemplated by the memorandum of association at all.

But then it is said another patent has been obtained, namely, the Swedish patent. It seems almost ludicrous to imagine that the *German Company*, a company formed for the purpose of carrying on business in *Germany*, can say that it has taken any steps towards the accomplishment of that object by obtaining a Swedish patent for the same invention. I look to the memorandum of association again, and the only clause under which it is pretended to justify that acquisition of the Swedish patent, which is only obtained, if at all, under the agreement of the 12th of October, 1881, is the 7th clause, and the 7th clause is this: "To acquire by purchase or otherwise, and to use, exercise, and vend any other inventions for the above-mentioned or cognate purposes." The Swedish patent is not another invention but it is another patent for the same invention in another country, and I think it would be entirely *ultrà vires* to acquire the Swedish patent.

The absurdity of giving £50,000 for a Swedish patent and for a

(1) Law Rep. 2 Ch. 737. (2) *Ante*, p. 151.
(3) 5 Ch. D. 669.

C. A. 1882 *In re* GERMAN DATE COFFEE COMPANY. Kay, J.

license under the English patent to enable the *German Company* to make coffee in *Germany* is too glaring to need any comment at all.

I therefore think the whole substratum of the company has failed, and that the authorities I have referred to are sufficient not only to authorize but to oblige the Court to put a stop to the further proceedings of this company, which will, in my opinion, be neither more nor less than employing moneys obtained from the shareholders, in carrying on a business which practically is not authorized by the memorandum of association. I therefore make the usual winding-up order. No order as to costs, except that the company will take their costs.

T. W. G.

C. A.

From this judgment the company appealed. The appeal was heard on the 24th of February, 1882.

Ince, Q.C., and *Buckley*, for the Appellants, urged the same arguments as in the Court below. They referred to *In re Suburban Hotel Company* (1); *In re Langham Skating Rink Company* (2).

Freeman, for the shareholders supporting the appeal.

Romer, Q.C., and *Beddall*, for the Petitioners, and

Whitehorne, Q.C., and *Cecil Tennant*, for shareholders supporting the winding-up order, were not called on.

JESSEL, M.R.:—

This company, in my opinion, was formed, as the directors stated in their prospectus, for the purpose of purchasing and working *Henley's* German patent at *Frankfort*, for the manufacture of a partial substitute for coffee from the date fruit. Of course, I do not use the prospectus for the purpose of interpreting the memorandum of association, I only use it for the purpose of shewing that my construction is probably correct, because it is the construction adopted by the chairman and directors of the com-

(1) Law Rep. 2 Ch. 737. (2) 5 Ch. D. 669.

pany after its incorporation, and before they issued the prospectus inviting the public to come in. It is the duty of the Court in construing a document, to read it and to ascertain its meaning fairly from the contents of it, but it is always a satisfaction to me when I find my construction of a contract is that which is adopted by every party to it.

The company is stated to be registered for several objects. The first object is to acquire a German patent granted to one *Henley* for manufacturing from dates a substitute for coffee. The second is to make and use the same invention or any improvement of it. That refers to the German patent. The memorandum is tautologous, an observation which need not be confined to this memorandum—it is very common as regards all memorandums of association. The third object is to adopt and carry out an agreement dated the 16th of February, 1881. When we come to look at that, it is an agreement for the sale of the German patent. Article 4 is to manufacture and sell the preparations which are the subject of the said invention. That is pure tautology. Nobody has been able to suggest that there is anything there which is not included in Articles 1 and 2. Article 5 is to grant licenses. Of course, if you have no patent you cannot grant licenses. Article 6 is to apply for and obtain patents for improvements or extensions of the said invention, and so on. Article 7 is to acquire and purchase, or otherwise to use, exercise, and vend, any other inventions for the above-mentioned or cognate subject. All those are merely ancillary provisions. Then there is Article 8, which I read to be this, to import all descriptions of produce, in connection with the above-mentioned purpose, or otherwise for the purposes of the company. It never can mean to import and export food produce generally. That would be making it a company for an entirely new and distinct purpose. The other reading is, in my opinion, the more grammatical reading of the two; but whether it is so or not, it is, I think, the correct reading, and is merely ancillary. That being so, it appears to me that this memorandum, when fairly read, and notwithstanding the rather loose use of general words, is simply to buy this patent, and to work it either with or without improvements. That is the substance of the whole thing.

C. A. 1882 — *In re* German Date Coffee Company. — Jessel, M.R.

Now what happened was this. I have no reason to doubt that the framers of the memorandum and articles believed that they would obtain the German patent, for they said, "for which a patent has or will be granted by the Empire of *Germany*." But they were a little too sanguine, and they cannot complain if, like other prophets, their prophecies are sometimes not verified by the result. It turned out that the German Empire would not grant the patent. When that happened what ought they to have done? Surely they ought to have said, "We cannot carry on business, and we must wind up;" and that is exactly what Mr. Justice *Kay* ordered to be done. There is an interim matter which ought not to be forgotten. A large number, in fact the majority of the applicants for shares, had their names taken off on the ground of deception. They understood there was a patent when there was not, and the number of shareholders left is very small—holding something like 13,000 shares in all—a very different company from the original company, which was formed with 100,000 shares. Then it turns out that the company has, quite *bonâ fide*, in anticipation of the granting of the German patent, established at *Hamburg* a factory for the manufacture of this substance called date coffee, and they say they have sold a good deal of it and are doing a prosperous trade. They have also entered into an agreement with the parent company, an English company called the *Date Coffee Company*, by which that company has agreed not to compete with this company in *Germany*. I ought also to refer to the affidavit of Mr. *Gardiner*, who says that he applied in September for a patent on behalf of Mr. *Henley*, but he does not say that he obtained it, and I therefore assume that for some reason or other it was refused. This application, whatever the result may have been, appears to me no ground for varying the order which has been made. That being so, it seems to me, as the learned Judge of the Court below said, the whole substratum of the company is gone. Its business was not to make a substitute for coffee from dates, but to work a German patented invention in *Germany;* to work it under the monopoly granted by the German Government to the patentee, and not to enter into any such business generally. Therefore the shareholders have a right to say, and the minority of the shareholders have a right to say, "We did

not enter into partnership on these terms." It is exactly like *Baring* v. *Dix* (1). It was not a general partnership to make a substitute for coffee from dates, but to work a particular patent, and as that particular patent does not exist, and cannot now exist, they are entitled to say the company ought to be wound up.

It appears to me the learned Judge in the Court below has arrived at the right conclusion, and that this appeal ought to be dismissed. If the full effect of the general words is allowed they might carry on any business whatever.

BAGGALLAY, L.J.:—

I am of the same opinion. It appears to me that the principle involved in the decision of *In re Suburban Hotel Company* (2) by Lord *Cairns* amounts to this, that if you have proof of the impossibility of carrying on the business contemplated by the company at the time of its formation, that is a sufficient ground for winding up the company. Therefore the question arises in the present case, is there an impossibility of carrying out the objects of the company? I cannot entertain any doubt, having regard to the memorandum of association, and the view I take of the memorandum is verified by the surrounding circumstances, that the real contemplated object of the company at the time when it was formed was to carry out the manufacture of German date coffee, to be manufactured from dates, to be manufactured in *Germany* under a patent that was actually granted or about to be granted, and that in the contemplation of all parties the granting of the letters patent in *Germany* for the working of this invention was the basis of the company. No doubt in this case, as in many other cases, you have a variety of general words added which, if they are to be construed by themselves, would give powers to carry on almost any possible business which could be suggested. These must be taken within certain limits, and those limits are, that they must be regarded as ancillary to the purport of the scheme for which the company was formed. It appears to me, from the memorandum of association so construed, that the business of the company was the manufacturing of coffee by virtue of a patent already obtained, or to be obtained, with the benefit of any improvement that might

(1) 1 Cox, 213. (2) Law Rep. 2 Ch. 737, 742.

C. A. 1882

In re GERMAN DATE COFFEE COMPANY.

Baggallay, L.J.

be made by the patentee or the company in connection with that patent.

Now, is there an utter impossibility in carrying on the business of the company? It appears to me from the evidence that there is. Not only is there very strong evidence that the obtaining of these letters patent was contemplated by all the parties who took shares, but the holders of 27,000 shares, being more than one quarter of all the shares in the company, had their names removed from the register of shareholders, on the ground that they had been deceived by a statement in the prospectus that the patent had been already obtained.

It appears to me beyond all question that there is an impossibility of carrying on the business of the company, and I think that the order Mr. Justice *Kay* made is quite correct. I feel bound to say I entirely go with him in the enunciation of the law applicable to the case, and his criticisms on the cases.

LINDLEY, L.J.:—

I am of the same opinion. The first question we have to consider is, What is the fair construction of the memorandum of association? It is required by the Act of 1862 to state what the objects of the company are. In construing this memorandum of association, or any other memorandum of association in which there are general words, care must be taken to construe those general words so as not to make them a trap for unwary people. General words construed literally may mean anything; but they must be taken in connection with what are shewn by the context to be the dominant or main objects. It will not do under general words to turn a company for manufacturing one thing into a company for importing something else, however general the words are. Taking that as the governing principle, it appears to me plain beyond all reasonable dispute that the real object of this company, which, by the by, is called the *German Date Coffee Company, Limited*, was to manufacture a substitute for coffee in *Germany* under a patent, valid according to German law. It is what the company was formed for, and all the rest is subordinate to that. The words are general, but that is the thing for which the people subscribe their money.

C. A.
1882
In re
GERMAN
DATE COFFEE
COMPANY.
Lindley, L.J.

Now, I attach great importance to an observation made by Mr. *Buckley*, that the petitioners did not wait for a year after the formation of the company before presenting their petition. It was presented within a year, and therefore we ought to be careful in considering what ought to be done under those circumstances, because the Act of Parliament gives the company a year to see whether it can get to work or not. The language of the 79th section, sub-s. 2, is, "Whenever the company does not commence its business within a year from its incorporation, or suspends business for the space of a year." That, I understand, is to give the company a reasonable time. Supposing that there was no proof that the company had failed within a year, I should think that the company was entitled by statute to a year — the shareholders would be entitled to it. But when we have to deal with a case in which it is apparent within a year that the whole thing is abortive, that the company cannot acquire that which it was intended to acquire, and cannot carry out the objects for which it was formed, the Act of Parliament does not require us to wait a year, and the case is then brought fairly within the 5th clause of the same sub-section, *i.e.*, whenever the Court is of opinion that it is "just and equitable" that the company should be wound up.

I proceed, therefore, to the next point, whether the petition having been presented within the year the evidence shews that the objects for which the company was formed cannot be attained. To my mind the evidence is overwhelming. The company have tried to get this patent and have failed, and the only point which appears to me to present any difficulty is that last thrown out by Mr. *Ince*, and very properly insisted on by him and Mr. *Buckley*, that there is even now an application to the Government for a patent. I have looked at that a little closely, and my opinion is there is nothing in it at all. Mr. *Gardiner* makes an exhibit of a document from the German Patent Office; I have looked at it, and all it comes to is this—it is a certificate that an application had been made to the Imperial Patent Office on behalf of Mr. *Henley*, of *London*, for a patent for an apparatus for drying and roasting dates; that is what is applied for. That was the 21st of September, and we are told that in the absence of opposition a patent would be got in two months. That would be

C. A. 1882 *In re* GERMAN DATE COFFEE COMPANY. Lindley, L.J.

the 21st of November, and this affidavit is sworn the 4th of February, 1882, and there is still no patent. What does such an affidavit mean? It is a mere blind; it is put on the file to throw dust in the eyes of the Court.

It appears to me, therefore, that the judgment of Mr. Justice *Kay* was perfectly correct, and that the facts warrant the judgment he pronounced, and the application ought to be dismissed with costs.

Solicitors: *Longcroft & Myers; Nye & Greenwood; R. Reece; J. Tucker.*

M. W.

C. A. 1881 V.-C. B. *Feb.* 23, 24. C. A. 1882 *March* 7.

STANNARD *v.* VESTRY OF SAINT GILES, CAMBERWELL.

[1878 S. 480.]

Jurisdiction—Injunction—Trespass—Proceedings before Justices.

Where the Legislature has pointed out a special tribunal for determining a question, as a general rule no other Court ought to restrain the proceedings before it; but where the question has come before another Court in independent proceedings in which it is necessary to decide the whole matter between the parties, the Court may in such case restrain the proceedings elsewhere by injunction in order to save expense.

A dispute having arisen between the Defendants, who were a local authority, and the Plaintiff about a drain which the Plaintiff had interfered with, the Defendants gave notice to the Plaintiff that they would enter on his land and reinstate the drain; but they afterwards abandoned their intention, and instead took proceedings against him before the magistrate. The Plaintiff then brought an action against the Defendants, claiming an injunction to restrain them from trespassing on his land, and from proceeding against him before the magistrate. In the statement of claim the Plaintiff did not in terms allege that the Defendants threatened and intended to trespass on the land:—

Held (affirming the decision of *Bacon*, V.C.), that as no intention to commit a trespass was proved or alleged, the Plaintiff had not made out his case for an injunction against the trespass; and that being so, the Court had no jurisdiction to restrain the proceedings before the magistrate.

Hedley v. *Bates* (1), and *Great Western Railway Company* v. *Waterford and Limerick Railway Company* (2), explained.

ON the 13th of September, 1875, the Plaintiff, *William Thomas Stannard*, contracted with the *British Land Company, Limited*, for

(1) 13 Ch. D. 498. (2) 17 Ch. D. 493.

the purchase from them of five plots of land, laid out for building purposes, forming part of the *East Dulwich* estate, *Camberwell, Surrey*. These were numbered 492 to 496, fronting on a road, afterwards called *Overhill Road*. The particulars of sale contained the words, "Each lot is sold subject to such rights of way, watercourses, and drainage, and other easements, if any, as may affect the same in the hands of the vendors." The conveyance did not reserve to the vendors any power or right to lay down any drain or sewer through or across the Plaintiff's plot of land, nor did it reserve to the company any right of way, watercourse or easement whatsoever.

In the early part of 1876, the vendors, the land company, entered upon the Plaintiff's plot of land, and in fulfilment of their own undertaking when they purchased the estate, and under the superintendence of the Defendants, the vestry of *St. Giles, Camberwell*, constructed a drain, at their own expense.

This drain began at a point to the east of the Plaintiff's land, and was continued all through the plots purchased by him, as the company (who were originally made Defendants to the suit, but were afterwards discontinued by notice of the 15th of May, 1879), alleged, with the privity and at the request of the Plaintiff, and for the express purpose of draining his property.

This drain, as the Defendants the vestry alleged, was part of a system of drainage undertaken in 1869 by the land company, to be carried out after they had purchased the *East Dulwich* estate, and approved by the Metropolitan Board of Works. It was, as they alleged, intended to be, and actually became a public sewer.

Shortly after the 12th of April, 1876, the date on which the Plaintiff first had the deed of conveyance delivered to him, he found it contained no such reservation as above mentioned, and thereupon complained to the company, who told him that the drain was vested in the vestry. The Plaintiff thereupon complained to the vestry that the requirements of certain Acts of Parliament had not been complied with, and meeting, as he said, with no redress, shortly before the 10th of January, 1877, began building a stable on part of one of the lots, numbered 492, and in so doing removed part of the drain. Thereupon the vestry served the Plaintiff with notice under sect. 69 of the

C. A. 1882 STANNARD v. VESTRY OF SAINT GILES, CAMBERWELL.

Metropolitan Management Act Amendment Act, 1862 (25 & 26 Vict. c. 102), calling upon him to appear at the *Lambeth* Police Court, to answer the complaint of having taken up the sewer. The Plaintiff contended that the drain was not a sewer within the meaning of the statutes; but the magistrate (Mr. *Ellison*) decided that it was, and after several adjournments, the magistrate having withdrawn permission to state a case which he had at first granted, the Plaintiff was on the 21st of June, 1877, ordered to pay a penalty of £1, and £6 6*s*. for costs.

The Plaintiff still refusing to restore the drain, or as the vestry called it, the sewer, the vestry, on the 17th of May, 1878, served the Plaintiff with a notice to repair or reinstate the sewer before the 30th of May, and giving him further notice that in the event of his not complying they would reinstate it at his expense, under the above section.

The vestry did not, however, enter the Plaintiff's land, but on the 22nd of July, 1878, served a further summons under sect. 69 on the Plaintiff for penalties, who again attended before the magistrate, and contended, as before, that the drain was not a sewer. On the 30th of July, 1878, the Plaintiff was ordered to pay penalties amounting to £12 5*s*., and £2 4*s*. for costs.

The Defendants alleged that the Plaintiff gave notice of his intention to appeal to the Quarter Sessions, but if the Plaintiff ever had such intention, he did not prosecute it.

On the 24th of October, 1878, the vestry served another notice on the Plaintiff for penalties, not threatening to enter.

Notice that the present action was about to be commenced was on the 17th of October, 1878, given by the Plaintiff's solicitors, and on the 10th of November, 1878, the writ was issued. The statement of claim delivered on the 14th of January, 1879, stated the facts above set forth, the notice of the 17th of May preceding, but did not allege that the Defendants threatened or intended to enter the Plaintiff's land. It claimed an injunction restraining the Defendants from restoring, repairing, or reinstating the drain, and from entering the Plaintiff's land for that purpose; also an injunction restraining the Defendants from commencing or continuing any proceedings against the Plaintiff in the Police Court respecting the drain, or his acts relating thereto.

The Defendants, by their statement of defence, said they had acted solely in the *bonâ fide* exercise of powers and duties vested in and imposed upon them by the local sanitary authority, and upon the faith of the land company having handed over the drain or sewer to them, without knowledge of any agreement between the Plaintiff and the company.

They submitted that the Plaintiff's remedy, if any, was to have obtained a special case for one of the Superior Courts at *Westminster*, or by appeal to the Quarter Sessions, and that the Plaintiff had no remedy by action in this Court.

Issue was joined on the 17th of February, 1881. The action came on to be heard before Vice-Chancellor *Bacon* on the 23rd of February, 1881.

R. Horton Smith, Q.C., and *W. W. Cooper*, appeared for the Plaintiff.

Hemming, Q.C., and *Everitt*, for the Defendants.

R. Horton Smith, in reply.

BACON, V.C. :—

In essence and in substance the case I am called upon to decide is a mere action of *quare clausum fregit*.

In my opinion there is not a particle of evidence, nor the slightest reason in the narrative I have heard, to induce me to think that the vestry have done anything of which the Plaintiff has any legal right to complain. More than that, I think they have done nothing of which he has a right to complain, putting aside the law upon the point altogether; for the evidence is clear that after the Plaintiff became equitable owner of the land, he went to the surveyor of his vendors, the company, and pointed out the necessity of a drain, and that if there were no drain for the houses, damage would ensue. The surveyor upon that made a representation to the company, and they, considering the demand a reasonable one, thereupon, with the knowledge, no doubt, of the vestry, and without any interference or objection on the part of the vestry, made for the Plaintiff the watercourse (for so I will

C. A. 1882 STANNARD v. VESTRY OF SAINT GILES, CAMBERWELL. V.-C. B.

call it) in question at a cost of some £200; the Plaintiff standing by and seeing everything completed at his request.

That being so, what have the vestry done for which an action for damages would lie? They have not entered upon the Plaintiff's land. It had been said the work was done by the contractor of the vestry. It turns out that it was done by a man who contracted with the company, and who did the work at the instance of the Plaintiff. Even supposing the vestry to have done what is alleged against them, they did it by the request, and at the instance, and for the benefit of the Plaintiff.

This disposes of the merits of the case; because I disregard a number of other points that were raised by the Plaintiff.

He has said a great deal about the police court, and we know that the Legislature has appointed the process of the police court as a means whereby the vestry may exercise their authority. The vestry summoned the Plaintiff, he attended, the matter was investigated, and he was convicted. He talked about a special case, but he did not pursue it. He also talked about other proceedings, but he did not take them; and now he asks this Court, virtually, to review the magistrate's decision. I have neither the power nor the inclination to do that.

The Plaintiff suggests that the vestry had, at the time, a letter from the Metropolitan Board of Works, in which the Board said this watercourse was a drain and not a sewer; and that it did not come within the jurisdiction of the Board. Doubtless that was right, and the watercourse in question was under the superintendence of the vestry, and not of the Board of Works. But that does not aid the Plaintiff's case, or afford any ground for equitable interference.

Treating this as an action of trespass, in which the Plaintiff must and ought to be non-suited, there only remains the question of costs. The Defendants have offered to have the action dismissed without costs; but the Plaintiff has insisted that the defendants should pay his costs. The vestry would not have been justified in acceding to such a proposition, seeing that the costs would have had to be paid out of the ratepayers' money, which is levied for very different purposes. The Plaintiff might have ended the whole question in an easy and inexpensive way; he might, under

the *Judicature Act*, have taken steps to put an end to these useless and voluminous proceedings. He has not thought fit to do that, and the action must be dismissed with costs.

J. B. D.

From this decision the Plaintiff appealed. The appeal was heard on the 7th of March, 1882.

Davey, Q.C., and *Cozens-Hardy*, Q.C., for the Appellant:—

The real question is whether the Defendants threatened and intended to enter on the Plaintiff's land and reinstate the drain. We have proved that they did at one time, for they gave us notice of their intention, and they have never formally withdrawn their threat. Therefore the Plaintiff, if he shews that the threatened act would be a trespass, is entitled, under the authority of *Hedley* v. *Bates* (1), to an injunction to restrain the vestry not only from entering on his land, but also from taking proceedings against him before the magistrate, which would be merely subsidiary to their claim to reinstate the drain. The Defendants have never disputed that the only question between us is their right to the drain, and the High Court of Justice is the most suitable Court to determine that right. The fact that it is not formally pleaded that the Defendants threaten and intend to enter on the land is not material. We allege the facts from which their intention appears, and that is sufficient: *Hext* v. *Gill* (2).

Hemming, Q.C., and *Everitt*, Q.C., were not called on.

JESSEL, M.R., after stating the facts as mentioned above, proceeded to say:—

That being the position of matters, the Plaintiff issues his writ on the 10th of November, and he does not allege in his statement of claim that the Defendants either threatened or intend to enter upon his land. There is no allegation that that is a fact, and I believe the truth was that such an allegation could not be made. I think the Defendants are right when they say that they did not intend to enter upon the land. But, whatever the effect of

(1) 13 Ch. D. 498. (2) Law Rep. 7 Ch. 699.

C. A.
1882
STANNARD
v.
VESTRY OF SAINT GILES, CAMBERWELL.
Jessel, M.R.

the notice of the 17th of May might have been, that course of proceeding was not one the Defendants ultimately intended to adopt; and, indeed, the notice of the 24th of October, in my opinion, shews that clearly. However, the allegation is not there, and, as I said before, though the notice of the 17th of May, standing alone and without any further proceeding or any further explanation, would have been strong evidence of intention, it does not appear to me that there is here either sufficient allegation or sufficient evidence of intention on the part of the Defendants to enter upon the Plaintiff's land and commit a trespass.

That would dispose of the case so far as the question of trespass is concerned; but the Plaintiff goes on to ask an injunction to restrain the Defendants from taking any proceedings before the magistrate. Now, as a general rule, it is quite plain you cannot do that. Where the Legislature has pointed out a mode of proceeding before a magistrate it is not, as a general rule, for another Court to interfere to stop that proceeding by injunction.

I refer to that more particularly because the case of *Hedley* v. *Bates* (1), which I decided when sitting at the Rolls, was cited as an authority for the exercise of such a jurisdiction. In the first place, as I read *Hedley* v. *Bates*, it decided no such thing. In that case there was a manifest and admitted trespass, as will be seen by looking at pages 499 and 500 of the report, and then the Court, having to decide the question between the parties, went on to say that it was convenient to decide the other question—that is, whether or not the provisions of the Act of Parliament applied to the case in question. The magistrates there had no jurisdiction unless a certain notice was given; and the real question I had to decide was whether a valid notice had been given or could be given, and then it was said that that question must be decided by the magistrates when the case should come before them, which it must, and the answer was "That may be so; but where the whole matter is before the Court in the first instance and the Court has power to decide whether the magistrates had jurisdiction, it is much more convenient, instead of granting a prohibition, to grant an injunction between the same parties." But the whole doctrine which I laid down (as I thought clearly) in *Hedley* v. *Bates* was

(1) 13 Ch. D. 498.

dependent on the fact of the Court having a case to try within its undoubted jurisdiction, if I may say so, over and above the question which the magistrates could decide. I know that another view has been taken of *Hedley* v. *Bates* (1). However, the point came before me again in the case of *Great Western Railway Company* v. *Waterford and Limerick Railway Company* (2). It is not reported on that point, though it is reported on other points. If the report is looked at it will be seen that there were two appeals; one appeal was against my refusal to grant an injunction, and the other appeal was in the action of prohibition. The prohibition case is fully reported. It was an important case, and the Appeal Court differed from me on the construction of the statute. The case as to an injunction is simply reported by saying that the appeal against the refusal of the injunction was dismissed with costs.

In that case I explained, somewhat in the same way that I have to-day, what the meaning of *Hedley* v. *Bates* was, and I refused the injunction in that case because I said the Court is not seized of the case otherwise. It is a mere case of prohibition, and there is no reason for changing the mode of proceeding from prohibition to injunction where you are not compelled to decide the question on other grounds between the same parties; and in that case, having refused that injunction, that refusal was affirmed by the Court of Appeal.

Therefore, we have to consider in this case whether there is any ground for the Court interfering independently. If there is not (and as I have said before there is not) we ought not to interfere in the action by granting an injunction to prevent the vestry going before the magistrate, that being the tribunal appointed by the Legislature to decide such questions. If they do go before the magistrate again and the magistrate should decide in their favour, the Plaintiff may appeal. The Plaintiff might have appealed before, and I do not know why he did not.

There is, therefore, no ground for coming to this Court for an injunction. If there were, you might come for an injunction in every case within the magistrate's jurisdiction simply on the ground that the magistrates have decided wrongly if they should decide against parties such as the Plaintiff in this case.

(1) 13 Ch. D. 498. (2) 17 Ch. D. 493.

C. A. 1882

STANNARD v. VESTRY OF SAINT GILES, CAMBERWELL.

It appears to me that that would not support the action any more than the other considerations I have mentioned. Therefore the appeal must be dismissed.

SIR JAMES HANNEN :—

The question in this case appears to me to be this, whether, at the time the action was brought, there was reasonable ground for apprehension that the vestry were about to enter on the Plaintiff's land. If there was such a reasonable ground for apprehension we should be obliged indirectly to determine whether or not it would have been a trespass to do so; but if there was no reason to fear such a thing we are not called upon to say whether this was a sewer or a drain, on which the question of trespass seems to have been assumed to depend.

It appears to me that in May, 1878, when the letter which is set out in the statement of claim was written, there was at any rate evidence of an intention on the part of the vestry to do the work themselves, and that of course would have required that they should enter upon the premises, and so, as has been alleged by the Plaintiff, commit a trespass. But in fact they did not do so; they did not enter upon the ground, but they took other proceedings. They served a summons.

Now, if the Plaintiff had really feared that the vestry were about to enter upon his premises he might, if he had liked, then have commenced this action; but instead of doing that he defended himself before the magistrate unsuccessfully, and not only once, but twice. Then, in October, 1878, this takes place. The vestry serve upon the Plaintiff a notice which says that if he does not do what they require, further proceedings will be taken against him for the recovery of penalties for recurring offences each day, saying nothing about an intention to enter. We have seen what his conduct was. He defended himself before the magistrates. There was nothing in what had taken place since May to arouse the apprehensions which had slumbered all that time; but he then takes these proceedings, and I must say that I agree with that which underlies the Vice-Chancellor's judgment, that this is an attempt on the part of the Plaintiff, after having failed before the magistrate, to get this Court to review the decision of the

magistrate, which the Plaintiff had failed to take the proper steps to have set right if it was wrong.

For these reasons it appears to me that the decree of the Vice-Chancellor was right, and that this appeal should be dismissed.

LINDLEY, L.J.:—

I am of the same opinion. I have very little to add to what has been said.

In point of fact the Defendants never have trespassed upon the Plaintiff's land. The letter that was written in May amounted to an expression of intention that they would do so; but they did not, and before the statement of claim was delivered they altered their method of procedure altogether. They summoned the Plaintiff instead of committing a trespass, and they obviously did that advisedly; and they, having changed their tactics and there being absolutely no evidence whatever of any intention to commit a trespass—no evidence of anything of the sort—and nothing except an inference to be drawn from the letter of May, after a change of tactics, we are asked to grant an injunction.

It appears to me that the real object of this litigation is to get the Court to decide whether the so-called drain is a drain or a sewer. We cannot do that in this action.

Therefore, in my opinion, the decision of the Vice-Chancellor is quite right and must be affirmed.

Solicitors: *Sole, Turner, & Knight; Marsden & Son.*

M. W.

V.-C. B.
1882
April 1, 4.

BIGGS *v.* PEACOCK.

[1881 B. 7016.]

Partition—Trust for Sale—Partition Act, 1868, *s.* 4 [*Revised Ed. Statutes, vol. xv. p.* 696].

The Court has no jurisdiction at the instance of the tenant for life and reversioners, *sui juris* and beneficially interested to the extent of a moiety, to direct a sale or partition under the *Partition Acts* of property over which there is a discretionary power of sale in trustees still subsisting.

A discretionary power of sale *held* not to have been put an end to during the life of the tenant for life by the fact that all the reversioners had acquired vested interests in their shares.

DEMURRER.

James Biggs, who died in 1853, by his will dated the 20th of October, 1847, directed his widow and the other trustees for the time being of his will, at such times and in such manner as they, she or he should think fit, to sell his copyhold estate in manner therein mentioned. And the trustees or the survivors or survivor of them were directed to stand possessed of and interested in the net moneys to arise from such sales, and in his personal estate, or the proceeds thereof, upon trusts for investment, and upon trust to pay the income of such investments to his widow for life, and after her death to stand possessed of the said trust-moneys and investments, and the income thereof in trust for all his children, who being sons or a son should attain twenty-one years, or being daughters or a daughter should attain that age, or marry under that age.

At the time of his death the testator had eight children, two of whom died under twenty-one, and without having been married. The remaining six were all living and had attained twenty-one.

Of the testator's copyhold estate, which had been enfranchised and consisted of about seven acres, one acre had been sold, and the proceeds distributed according to the directions contained in the will.

The widow and three of the six children (who had mortgaged

their shares in the estate) had brought this action for a partition of the unsold remainder of the enfranchised copyhold hereditaments.

Defendants, the surviving trustee (other than the widow), and the remaining three children, had demurred to the action.

F. T. Procter, in support of the demurrer:—

The testator having given a direction to his trustees to sell at such time and in such manner as they shall think fit, the Court has no jurisdiction, while that trust is still subsisting, to direct a sale or partition under the Partition Acts, so as to interfere with and put an end to the active trusts created by the will: *Swaine* v. *Denby* (1); *Taylor* v. *Grange* (2); *Cass* v. *Wood* (3).

As reversioners, the Plaintiffs, other than the testator's widow, cannot maintain an action for partition: *Evans* v. *Bagshaw* (4).

Russell Roberts, for the Plaintiffs:—

The question is whether a general power of sale takes away the right to partition. The widow and the three reversioners, who are all *sui juris*, are collectively entitled in possession to a moiety of the proceeds of sale if the power were exercisable and exercised, and are therefore "individually or collectively interested to the extent of a moiety or upwards," within the *Partition Act*, 1868, s. 4, so as to give them the right to a sale of the property. As soon as the estate has vested in the children the power of sale given to the trustees ceases, and can no longer be validly exercised by them.

In *Trower* v. *Knightley* (5), one moiety was vested in infants, and subject to a life interest, and it was there held that the power of sale subsisted until there were persons competent to deal with the whole estate: see *Sugden* on Powers (6). In *Cass* v. *Wood* the power of sale had not yet arisen because the tenant for life was alive, nor could there be a partition because the share of one of the reversioners was settled. But as soon as the title to any part of the property has become absolutely vested, the power of

(1) 14 Ch. D. 326.
(2) 13 Ch. D. 223; 15 Ch. D. 165.
(3) 30 L. T. (N.S.) 670.
(4) Law Rep. 5 Ch. 340.
(5) 6 Madd. 134.
(6) 8th Ed. p. 861.

V.-C. B. 1882 BIGGS v. PEACOCK.

sale in the trustees is at an end: *Lantsbery* v. *Collier* (1); *Doncaster* v. *Doncaster* (2).

In *Taylor* v. *Grange* (3) as infants and others were interested in reversion, it was considered that the power of sale was still exercisable: *Swaine* v. *Denby* (4) is distinguishable, as in that case the tenant for life objected, whereas here the tenant for life concurs, and is a co-Plaintiff; and her life interest, in combination with that of reversioners who are interested in a moiety, is equivalent to a present absolute vested interest which prevents the exercise of the power of sale, and entitles them to ask for a sale, or partition of the estate under this Act.

BACON, V.C.:—

In my opinion the Court has no jurisdiction to make a partition decree while a perfectly valid power of sale subsists. The cases cited have no direct application, but *Cass* v. *Wood* (5) is the nearest. How can I take away from the trustees the power of sale which the testator has given them to be exercised at their absolute discretion? I have no power to deprive them of their legal right; the *Partition Act*, s. 4, affords no ground for my doing so, and if I were to direct a sale I should be doing what is arbitrary and unjust and what I am not empowered to do. The demurrer must be allowed with costs.

Solicitors: *R. Chapman; Blewitt & Tyler.*

(1) 2 K. & J. 709.
(2) 3 K. & J. 26.
(3) 13 Ch. D. 223; 15 Ch. D. 165.
(4) 14 Ch. D. 326.
(5) 30 L. T. (N.S.) 670.

F. G. A. W.

Ex parte RECTOR OF KIRKSMEATON. *In re* HULL RAILWAY AND DOCK ACT.

V.-C. H.
1882
Jan. 13.

Glebe Lands taken by Railway Company—Application of Purchase-moneys—Incumbrance—Rent-charge—Lands Clauses Consolidation Act, 1845, *s.* 69 [*Revised Ed. Statutes, vol. ix. p.* 642]—*Cash under Control of Court.*

A railway company took part of glebe lands which were subject to a yearly rent-charge created under the *General Land Drainage and Improvement Company's Act*, 1849, to repay money borrowed by a former rector for outlay on the glebe. The company paid the purchase-moneys into Court under the *Lands Clauses Consolidation Act*, 1845, and the incumbrancer being willing to take a lump sum in lieu of the remaining payments of the rent-charge (eleven in number), the rector petitioned to have this sum paid off out of the fund in Court, and to have the residue of the fund invested as if it were cash under the control of the Court :—

Held, first, that even supposing that the rector could himself have charged the inheritance of the glebe to provide for or to repay similar outlay, the Court ought not to disturb the existing state of things and allow the fund in Court to be applied in anticipating the future payments of the rent-charge.

Secondly, that money paid into Court under the *Lands Clauses Consolidation Act*, 1845, is not to be invested as cash under the control of the Court, but only in the manner specified in the Act.

In re Fryer's Settlement (1) not followed.

PETITION.

A railway company formed under the *Hull, Barnsley, and West Riding Railway and Dock Act*, 1880 (which incorporated the *Lands Clauses Consolidation Act*, 1845), took part of the glebe lands belonging to the rectory of *Kirksmeaton*, and paid the purchase-moneys, amounting to £1150, into Court.

There were two incumbrances affecting the glebe lands. First, an annual rent-charge of £27 1*s.* 3*d.*, created by an order of the Inclosure Commissioners dated the 26th of June, 1862, and made in pursuance of the *General Land Drainage and Improvement Company's Act*, 1849 (12 & 13 Vict. c. xci.), and payable for a period of thirty-one years from the date of the order, for the purpose of repaying a sum of £403 9*s.* 6*d.* borrowed by a former rector for the erection of farm buildings on the glebe. This rent-charge was calculated so as to cover principal and interest, and

(1) Law Rep. 20 Eq. 468.

V.-C. H. 1882

Ex parte Rector of Kirksmeaton. *In re* Hull Railway and Dock Act.

also a sum of £20 13*s.* 9*d.* for costs, and it would expire on the 26th of June, 1893. Secondly, the sum of £1100 borrowed by the present rector from the Governors of Queen *Anne's* Bounty, and repayable by annual instalments.

The first mentioned incumbrance having become vested in the *Yorkshire Insurance Company*, and that company being willing to accept a lump sum of £260 in satisfaction of the remaining instalments, the rector now petitioned that out of the fund in Court this £260 might be paid to the insurance company, and that the balance might be invested in *East India* £4 per Cent. Stock.

As the Governors of Queen *Anne's* Bounty required to be paid by instalments, it was not proposed to pay off their incumbrance, or any part of it, out of the fund in Court.

Hastings, Q.C., and *Henry Fellows*, in support of the petition:—

The debt for the repayment of which this rent-charge was created was incurred for the erection of farm buildings on the glebe, and the fund in Court is properly applicable under the 69th section of the *Lands Clauses Consolidation Act*, 1849, towards satisfaction of it as being in discharge of a debt or incumbrance affecting the lands of the rectory: *Ex parte Rector of Gamston* (1); *Ex parte Rector of Grimoldby* (2); *Ex parte Rector of Shipton-under-Wychwood* (3); *Ex parte Lockwood* (4); *Re Vicar of Queen Camel* (5); *In re Leigh's Estate* (6). Moreover, under the Act of 1849, in pursuance of which this rent-charge was created (12 & 13 Vict. c. xci.), ss. 56, 60, 62, 68, and 69, and Schedule E, the Petitioner has himself power to mortgage the inheritance of the glebe lands and this very fund in Court, either to pay for the erection of new buildings on the glebe or to repay money already so laid out, and to secure repayment either in a lump sum or by instalments. This being so, he is entitled to have the existing rent-charge paid off out of that fund.

The petition prays for an investment in *East India* £4 per Cent. Stock, but as your Lordship has on previous occasions intimated

(1) 1 Ch. D. 477.
(2) 2 Ch. D. 225.
(3) 19 W. R. 549.
(4) 14 Beav. 158.
(5) 11 W. R. 503.
(6) Law Rep. 6 Ch. 887.

your disapproval of that stock as an investment, we ask that it may be invested in Bank Stock. Upon the true view of the authorities purchase-moneys paid in under the *Lands Clauses Consolidation Act*, 1845, are to be treated as cash under the control of the Court within the meaning of *Lord St. Leonards' Act*, 1860 (23 & 24 Vict. c. 38), s. 10, and of the 1st General Order of the 1st of February, 1861, and may be invested accordingly. As was pointed out in *In re Fryer's Settlement* (1), Lord *Selborne*, when holding in *Re Boyd's Settled Estates* (June 2, 1873), that moneys paid into Court under the *Settled Estates Act* were not cash under the control of the Court, was under the impression that he was deciding in accordance with the latest decision of the Master of the Rolls in *Shaw's Settled Estates* (2). This was a misapprehension of fact, for the then latest decision of the Master of the Rolls was *Reading* v. *Hamilton* (April 20, 1872), in which he followed, not *Shaw's Settled Estates*, but *In re Cook's Settled Estates* (3), where he had decided that such moneys were cash under the control of the Court. Moreover, if it were not so, your Lordship is not bound to follow *Re Boyd's Settled Estates* (June 2, 1873); for Lord *Selborne*, when sitting, as he then was, for a Judge of first instance, viz., *Romilly*, M.R., must be deemed to have been deciding in that capacity: *Re Taddy's Settled Estates* (4). We therefore ask your Lordship to adhere to your own decisions in *In re Fryer's Settlement*, and in *In re Southwold Railway Company's Bill* (5), which are in accordance with the decision of the Master of the Rolls above mentioned, and with that in *In re Foy's Trusts* (6).

Upon the question of costs they cited *Ex parte Jones* (7).

Jolliffe, for the Governors of Queen *Anne's* Bounty:—

These moneys are not cash under the control of the Court, and can only be invested in the manner pointed out by the *Lands Clauses Consolidation Act*, 1845. The question must be taken to have been decided by Lord *Selborne* in *In re Boyd's Settled Estates*,

(1) Law Rep. 20 Eq. 468.
(2) Ibid. 14 Eq. 9.
(3) Ibid. 12 Eq. 12.
(4) Law Rep. 16 Eq. 532.
(5) 1 Ch. D. 697.
(6) 23 W. R. 744.
(7) 14 Ch. D. 624.

V.-C. H. 1882 *Ex parte* RECTOR OF KIRKSMEATON. *In re* HULL RAILWAY AND DOCK ACT.

which must be regarded as a binding decision upon the point: *Ex parte Vicar of St. Mary's, Wigton* (1); *Langmead* v. *Cockerton* (2), notwithstanding the *dictum* of Vice-Chancellor *Malins* in *Re Taddy's Settled Estates* (3), which is the only authority for treating Lord *Selborne*, when sitting for the late Master of the Rolls, as a Judge of first instance.

Brodrick, for the *Yorkshire Insurance Company*.

Burgett, for the Railway Company.

HALL, V.C.:—

This application to apply a portion of the fund in Court towards satisfying a charge upon the glebe in respect of outlay for farm buildings under the provisions of a quasi-private Act of Parliament, which charge, if the existing state of things remained undisturbed, would be paid off in instalments by the incumbent for the time being—is one which I ought not to accede to.

It is said that the incumbent, as landowner within the meaning of the 12 & 13 Vict. c. xci., might himself create a charge upon the inheritance of the rectory for the purpose of paying off this sum, and therefore that he is entitled to have the fund in Court applied in payment of the existing debt. But it seems to me that in dealing with this fund I ought not to go into any investigation as to what might be done under a state of things which has no real existence, but that I ought to look at what is the real state of things now; which is, that this charge is to be paid off by instalments by the incumbent for the time being, and will get cleared off in the year 1893 if matters are left as they are. Now, the 69th section of the *Lands Clauses Consolidation Act*, 1845, provides that the moneys are to remain deposited in the way specified until the same be applied to some one or more of several purposes, one of which is the purchase or redemption of the land tax, or the discharge of any debt or incumbrance affecting the land; and when I am asked to apply this fund under that section I must consider, as I have already said, what is now the state of the fund and the

(1) 18 Ch. D. 646. (2) 25 W. R. 315.
(3) Law Rep. 16 Eq. 532.

position of the so-called incumbrance which I am asked to pay out of it, and I must deal with the application in a manner which having regard to the existing state of things is fair and reasonable. Now it seems to me that it would be both unfair and unreasonable to apply this fund by anticipation in liquidation of a series of payments by instalments which will be completed in the year 1893, and will therefore in all human probability fall to a great extent, if not wholly, upon the existing incumbent. I do not know his age, but it may be that all the instalments will have to be paid by him, and I decline to disturb the existing state of things. I think it would be wrong for me to do so even if, applying literally the provisions of the different enactments, this rent-charge be a charge which, under certain circumstances, might have been satisfied out of the fund in Court. If such an application of that fund had been competent it would not, as it seems to me, have been under the circumstances within the spirit of the provisions of the Act of Parliament, and I decline to apply the fund in that way.

With regard to the prayer of the petition as to the investment in *East India* stock; that particular stock now commands a considerable premium in the market, it will soon be paid off, and there will apparently be a loss to the successors of the Petitioner if it is so invested. Those are reasons which have operated with regard to other investments, not only in this branch but in the other branches of the Court, and I think that to permit an investment in *East India* Stock would be a wrong application of the fund. Then comes the question whether this money which has been paid under the *Lands Clauses Consolidation Act*, 1845, can be invested as cash under the control of the Court, and the Petitioner, upon the footing that it can, is desirous of selecting Bank Stock, which is one of the investments sanctioned by the Court for cash under its control. To this it has been objected that the Court is bound to invest this money in the manner pointed out by the *Lands Clauses Consolidation Act*, 1845, and that the subsequent Act, which relates to funds under the control of the Court, has nothing whatever to do with it. In support of the contention that this money can be treated as cash under the control of the Court, it is said that when Lord *Selborne* made his decision in *In re Boyd's Settled Estates*, he thought he was following the

V.-C. H. 1882 *Ex parte* RECTOR OF KIRKSMEATON. *In re* HULL RAILWAY AND DOCK ACT.

latest decision of the Master of the Rolls, and that his decision was therefore made under a misapprehension of fact. But I cannot say that Lord *Selborne* thought he was merely giving a judgment in accordance with the latest decision of the Master of the Rolls on the point. At all events, the matter is now to some extent in a different position, and I think that, having regard to the fact that there has been a further consideration of the question, I must hold that money paid in under the *Lands Clauses Consolidation Act*, 1845, ought not to be regarded as cash under the control of the Court. I am not at all convinced of the soundness of the decision, but I shall follow it. There will, therefore, only be an order for investment in consols and for payment of the dividends, and the railway company will only pay one set of costs, out of which Mr. *Jolliffe's* clients will get theirs first.

Solicitors: *Singleton & Tattershall*, agents for *Newman & Sons, Barnsley*; *Bell, Brodrick, & Gray*; *Dunning*; *Brooksbank & Galland*.

W. W. K.

V.-C. H. 1882 *Feb.* 6.

SCOTTISH WIDOWS' FUND *v.* CRAIG.

[1881 S. 1491.]

Glebe Lands—Drainage and Improvement Company—Rent-charge—Inclosure Commissioners, Order by—Arrears—Sale of Lands—Ecclesiastical Commissioners—Demurrer.

A rent-charge for a certain period of time, in arrear, charged by an order made by the Inclosure Commissioners upon the inheritance of the glebe lands of a rectory, under the provisions of the *General Land Drainage and Improvement Company's Act* of 1849 (12 & 13 Vict. c. xci.) was, under the provisions of the same Act, ordered to be raised by a sale of the glebe lands.

In an action by the owners of a rent-charge, in arrear, charged on glebe lands, for a declaration that they were entitled under the order made by the Inclosure Commissioners to a charge on the lands for the sums due and to become due of the rent-charge, and asking for a sale of the lands, the Ecclesiastical Commissioners were made Defendants:—

Held, on demurrer, that they were not necessary parties.

DEMURRER and motion for judgment.

The Plaintiffs—the *Scottish Widows' Fund and Life Assurance*

Society—a company incorporated in 1861, commenced this action in April, 1881, against the Reverend *D. Craig*, a person of unsound mind, so found by inquisition in May, 1858, *Margaret Craig*, spinster, the committee of his estate, the Bishop of *Ely*, and the Ecclesiastical Commissioners. The Rev. *D. Craig* was the rector of *Knapwell*, in the county of *Cambridge*, and also patron of the benefice. The extent of the glebe—agricultural land—was 149A. 1R. 12P.

In May, 1868, the *General Land Drainage and Improvement Company*, under the provisions of their Act passed in 1849 (12 & 13 Vict. c. xci.) entered into a contract with the Rev. *D. Craig's* committee to construct certain drainage works on the rectory estate, and to erect a farm-house and other buildings at the price of £1800. That sum, together with the costs, charges, and expenses of the contract, it was arranged should be made a charge upon the rectory estate.

The Inclosure Commissioners are by sect. 56 of the Act of 1849 empowered by order under their seal to declare that the inheritance of the lands or some sufficient part thereof "in or by such order specified is absolutely charged with the money advanced for the execution of improvements;" and by sect. 60 it is provided that the charge shall be by way of annuity or other periodical payment, the duration of which is to be fixed by the Commissioners, but not to be less than twenty-one years, and by sect. 62 the charge is to have priority over all other "existing, and future charges and incumbrances whatsoever," except quit rents and tithe commutation rent-charges, and charges under the Public Money Drainage Acts.

By sect. 65 the company or their assignees are empowered at any time after the commencement of the charge to enter upon the lands the inheritance whereof is charged and receive the rents and profits thereof until the principal money, interest, and costs are paid or satisfied, and by sect. 72 it is enacted that "every charge on land by virtue of this Act may be recovered by the company or the person for the time being entitled to the same by the same means and in like manner in all respects as a rent-charge in lieu of tithes if charged on the same land under the Act of the" 7th of Will. IV., "for the commutation of tithes would

V.-C. H. 1882 SCOTTISH WIDOWS' FUND v. CRAIG.

be recoverable, and as if such charge by virtue of this Act were a rent-charge in lieu of tithes made payable to the company or such person under that Act."

By sect. 68 the company are empowered to mortgage the lands charged for a term of years according to a form contained in a schedule to the Act.

By sect. 81 of the *Tithes Commutation Act* (6 & 7 Will. 4, c. 71) tithe rent-charge in arrear for twenty-one days may be recovered by distress, but it is provided that not more than two years' arrears shall at any time be so recoverable, and by sect. 82 when the rent-charge is in arrear for forty days and there is no sufficient distress on the premises, a writ is to be issued directing the sheriff to summon a jury to assess arrears, and the owner of the rent-charge may sue out a writ of *habere facias possessionem*, giving him possession until the arrears, and all costs are paid, subject however to the provision that not more than two years' arrears over and above the time of such possession shall be at any time recoverable.

The Inclosure Commissioners, by an order under their seal dated the 1st of April, 1869, and made pursuant to the Company's Act of 1849, ordered that the inheritance of the rectory estate be absolutely charged with the sum of £1800 for the works done on the estate, and mentioned in the contract, and with the sum of £72 6*s.* 3*d.*, paid for the costs, charges, and expenses in relation thereto, and that such charge was as follows, that is to say, a rent-charge of £116 to be paid for the period of thirty-one years from the date of the order, being after the rate in the order set forth, and to be payable half-yearly in April and October. The *General Land Drainage and Improvement Company*, by a deed made on the 21st of April, 1869, in consideration of the sum of £1872 6*s.* 3*d.*, assigned the rent-charge and all their powers, rights, and remedies to the Plaintiffs, the Society. The rectory estate was, at the date of the order in April, 1869, and until the end of the year 1879, in the occupation of a tenant, and out of the rent which he paid the half-yearly payments of the rent-charge were made to the Society, the last payment being in October, 1878.

In consequence of the mental incapacity of the rector, a curate had been, by the bishop of the diocese, appointed under the statute 1 & 2 Vict. c. 106, at a stipend of £80. The rectory

estate had since November, 1879, been unoccupied, no person being willing to become tenant of it. The sum of £290 had become due to the Society in respect of the rent-charge, and there was nothing upon the estate on which they could distrain. The statutory remedies given for enforcing payment of the rent-charge having failed, the Society brought this action, claiming a declaration that by virtue of the absolute order made in April, 1869, they were entitled in priority to all other persons to a charge on the rectory estate for the sums which had become due, and to become due of the rent-charge; for accounts; and for a sale of the estate and the application of the proceeds in payment of the amount due, and in making provision for the amounts to become due.

The Ecclesiastical Commissioners demurred to their being made parties to the action, on the grounds that they were not in any manner liable to the Society on account of the matters alleged; and that the statement of claim did not shew that the Society were entitled to sue them in respect of such matters.

The demurrer and action came on by arrangement to be heard together—the latter on motion for judgment. It was stated that the Bishop of *Ely* had not entered an appearance to the action, and that the Defendant, the committee of the estate, had entered an appearance but had not filed any statement of defence, and would not appear on the hearing of the action.

W. F. Robinson, Q.C., and *B. B. Swan*, for the Ecclesiastical Commissioners, submitted that they had been improperly made Defendants, as the statement of claim did not shew that they had any duty to perform in relation to the matter complained of, and no relief was sought against them. They had no interest in the matter, nor was it shewn that they had in any way been mixed up with the transaction which had taken place. The Commissioners had power over glebe lands attached to a spiritual benefice under the Church Building Acts and the New Parishes Acts for the purposes therein mentioned, and the *Ecclesiastical Leasing Act* (21 & 22 Vict. c. 57), but they had no jurisdiction in regard to this rectory estate. They referred to sects. 4 and 12 of that statute, and to *Peek* v. *Trower*, before the Master of the Rolls in December, 1877.

V.-C. H.
1882
SCOTTISH WIDOWS' FUND v. CRAIG.

In that case the action was in substance for the specific performance of an alleged contract. The Plaintiff was entitled to a moiety, and the Defendants were the other part owners, as trustees, of the advowson of a church in the City; the Ecclesiastical Commissioners, and the Rev. Mr. *Trower*, the rector of the united parishes, *St. Mary-at-Hill* and *St. Andrew Hubbard*. The ecclesiastical property was formerly houses, but had in recent years been turned into warehouses. The rector, as alleged, refused to perform his part of the contract. The Master of the Rolls, after observing that ecclesiastical property was by the restraining statutes inalienable, unless there were a power of alienation given by some other statute, without the consent of the incumbent, the patron, the bishop, and the Ecclesiastical Commissioners, refused to order the Commissioners to give their sanction to the sale of the property.

They also referred to Rules of Court, 1875, Order XVI., r. 3, and Order XIX., r. 7.

Kekewich, Q.C., and *Hornell*, for the Society:—

The Commissioners were properly made Defendants to the action. They were applied to to give their consent (under the 21 & 22 Vict. c. 57) to a sale, and declined to enter into any contract. As to the propriety of making them Defendants, that will be found in the statutes. It is sufficient to refer to them without alleging any reasons in the pleadings. Neither the case of *Peek* v. *Trower* nor the Orders and Rules referred to apply to this case. The main question is whether the owner of the rent-charge is entitled to enforce payment of it, and it is submitted that the provisions of the statute of 1849 (12 & 13 Vict. c. xci.) contain in sects. 51, 56, 60, 62, 64, 65, 68, 69, 72, 78, and 84, ample powers to enable the Court to make the declaration asked for. The rent-charge is by the 56th section of the statute a charge upon the inheritance, and may, as submitted, be ordered to be paid by a sale of the inheritance. Because special remedies have been conferred by the statute for its recovery the Plaintiffs are not deprived of their ordinary rights as owners of the rent-charge to have the arrears raised by a sale. The fact that this is glebe land, belonging to an ecclesiastical corporation, makes no differ-

ence, it is not excepted from the general law, that a person having a charge upon the fee is entitled to enforce it in the usual way. The *Conveyancing and Law of Property Act*, 1881, defines a mortgage as any charge on any property for securing money or money's worth (sect. 2, sub-sect. 6), and gives power to the Court to order a sale as in an action like this (sect. 25, sub-sect. 2): *Union Bank of London* v. *Ingram* (1). A person who has got a charge upon the inheritance is *primâ facie* a mortgagee, and he is entitled to, and there is nothing to exclude him from enforcing the remedies which a mortgagee has. The Plaintiffs are, it is submitted, entitled to enforce payment by a sale or a mortgage; and to ask for it quite independently of the recent statute, for the reason that they are owners of an equitable charge, created by statute, upon this land. A receiver was claimed, but it would be useless to appoint one, as there are no rents and profits. The sum due should be raised in the mode suggested: and provision should be made for the payment of future instalments.

HALL, V.C.:—

As regards the Ecclesiastical Commissioners, I do not find any reason for their being made Defendants to this action. They are persons who have no estate or interest in the property now sought to be dealt with in the action, and all that can be said in reference to them is that if a sale were sought without the intervention or not through the medium of the Court, but under the provisions of the statute 21 & 22 Vict. c. 57, it could not take place without their consent in writing. That, however, is not a sufficient reason for making them parties to an action brought by the Plaintiffs for a sale by order of the Court, and who state that they are entitled in respect of their interest to demand their consent to a sale—therefore, as regards the Commissioners, the demurrer must be allowed.

As regards the other question it is one of some difficulty, but I cannot see why a person, or a body of persons, like the Plaintiffs, who, having a title to a rent-charge which has been created under the provisions of a statute, should not be entitled to the same remedies as he or they would be entitled to if the property

(1) Weekly Notes (1882), p. 10.

V.-C. H. 1882 SCOTTISH WIDOWS' FUND v. CRAIG.

out of which the rent-charge issued was the property of a private individual and not the property of an ecclesiastical corporation. With a rent-charge certain remedies are created for its recovery, viz., distress and entry: that seems to be so on reference to the *Tithe Commutation Act*. This being the position of the Plaintiffs, the present owners of the rent-charge, and they being unable to obtain any payment of it by means of their special remedies which have been provided by the statute, because the rent-charge is by law a charge upon the property, they claim, by their action, to be entitled to the ordinary rights of an owner of such a charge to have it raised by a sale or mortgage of the property. The creation of this rent-charge was in many respects extremely favourable to the Plaintiffs asserting such rights, as the charge was made on the inheritance. It may be said, no doubt, that the object of making the charge on the inheritance was not to give any remedy beyond those specially provided by the statute, but only to bind those entitled in remainder, or the successors of the incumbent of the living: I must, however, take the facts as I find them, and if this be a rent-charge which would ordinarily be raiseable by the Court out of the inheritance, by resorting to it in the mode usually adopted—by means of a sale or a mortgage of it—if that be the character of the charge, I do not see that I should be justified in holding that there is anything in these statutes that deprives the Plaintiffs, the owners of the rent-charge, of the ordinary remedies. It seems to me that, quite independently of any special provision in the statutes which have been referred to, the Plaintiffs, the owners of the rent-charge, are entitled, on ordinary principles, to claim the assistance of the Court for the purpose of raising the charge, and I am not aware of any authority which states that because there are powers of distress and entry upon the property belonging to an ecclesiastical corporation, and because the payments which are to be made in respect of the rent-charge are not to be perpetual, but will be determined in a certain time, the owner of the rent-charge shall not be entitled to the ordinary remedies of having it raised by a sale or mortgage. The cases bearing on the question are very few. One of the earliest of them is that of *White* v. *James* (1),

(1) 26 Beav. 191.

which was decided by the late Master of the Rolls. In that case there was a series of rent-charges in perpetuity which were apparently co-equal, but could not be raised without resorting to a sale of the inheritance, and, under the circumstances, the Master of the Rolls directed that to be done, following what was done in *Cupit* v. *Jackson* (1). In *White* v. *James* (2) the grantee of the rent-charge had powers of distress and entry in himself and many other persons to raise the arrears, if any, by a sale, and, there being nothing on which to distrain, the Master of the Rolls, in his judgment, said, "When are the arrears to be paid? In ten or even twenty years hence it will be exactly the same question, and the observation of the Vice-Chancellor of *England* as to the fee simple falling into possession has occurred." The Master of the Rolls referred to what the Vice-Chancellor of *England* said in the case of *Graves* v. *Hicks* (3), where he declined to direct that the arrears of a rent-charge should be raised by a sale until there should be a tenant in fee simple in possession, *i.e.*, having regard to the circumstance of there not being such a tenant, he declined to make such an order, but not absolutely saying that the property should never be sold, only that it should not, under the circumstance of the case. The Master of the Rolls, in *White* v. *James*, said (4), "Am I to allow the owner to leave the rent-charges unpaid and the land to lie waste. If one grantee should attempt to make a distress it would make the property unavailable for the future payment of the rent-charges, for the tenants would leave, the property would become uninhabited and of no value to any one. If, therefore, it cannot be made available by letting it must be by sale." That seems to be the present state of things in this case—that the rent-charge can only be made available by means of a sale. Vice-Chancellor Sir *W. Page Wood* had the question before him in a case of *Hall* v. *Hurt* (5), and he referred to the decisions in the previous cases of *Graves* v. *Hicks* and *White* v. *James*. In *Hall* v. *Hurt* a charge was created and a term was vested in trustees to raise it by sale. It was considered that the money could not be raised by a sale of the fee, though the term

(1) 13 Price, 721; M'Cl. 495.
(2) 26 Beav. 191, 194.
(3) 11 Sim. 536–551.
(4) 26 Beav. 194.
(5) 2 J. & H. 76.

V.-C. H. 1882 SCOTTISH WIDOWS' FUND v. CRAIG.

was insufficient for the purpose, but a life annuity being granted by the same settlement by way of rent-charge, and it appearing that the arrears which had accrued could not be otherwise satisfied, a decree was made for the sale of the fee. Thus Vice-Chancellor Sir *W. Page Wood* followed the decisions in *Cupit* v. *Jackson* (1) and *White* v. *James* (2), and the case is, I consider, analogous to the present, while that of *Graves* v. *Hicks* (3), for the particular reason stated by the Vice-Chancellor of *England*, is not. It seems to me, therefore, however much it is to be regretted, that the Plaintiffs are entitled to have the property made available by a sale. Mr. *Kekewich* said, quite correctly, that in point of form the order will be for a sale of only so much of the property as will be necessary to raise what will be required to pay what is owing up to the present time. This must depend on the result of the account which will have to be taken. The Plaintiffs will raise by sale the arrears, but I cannot at present say what portion of the property will be required. The order, therefore, will be for a sale of so much of the rectory estate as will be considered necessary to raise the arrears now due, and the proceeds will be applied in payment thereof, and the Plaintiffs will have liberty to apply in Chambers to raise any further arrears which may hereafter from time to time accrue and become due.

Solicitors: *Freshfields & Williams; Jennings-White & Buckston.*

(1) 13 Price, 721; M'Cl. 495. (2) 26 Beav. 191, 194.
(3) 11 Sim. 536.

T. F. M.

In re COUNT D'EPINEUIL (1).
TADMAN *v.* D'EPINEUIL.

[1881 D. 24.]

FRY, J.
1882
March 10.

Administration—Insolvent Estate—Judicature Act, 1875, *s.* 10—*Bill of Sale.*

The 10th section of the *Judicature Act*, 1875, is not intended to enlarge the assets of an insolvent estate, but only to vary the rights of the persons entitled to the assets.

And therefore that section does not apply the rules of bankruptcy so as to make an unregistered bill of sale void as against the unsecured creditors of an insolvent estate.

ON the 18th of June, 1881, Messrs. *Myers*, trading as the *Bloomsbury Advance and Discount Company*, advanced to *Lionel* Count *D'Epineuil* £300 upon security of an unregistered bill of sale of his goods.

By such bill of sale Count *D'Epineuil* covenanted to pay the £300, with £50 for agreed interest, on the 18th of September, 1881. At that date, in consideration of a payment of £50, Messrs. *Myers* agreed to postpone the payment of the £300 to the 18th of December, 1881.

The borrower died on the 14th of October, 1881, insolvent. This creditors' action was instituted and a receiver appointed. The goods were sold, and the proceeds, amounting to £554 10*s.* 3*d.*, were now in the hands of the receiver, and Messrs. *Myers* applied by summons to have £350, part of that sum, paid to them.

The Plaintiff in the action disputed the claim of Messrs. *Myers*, on the ground that sect. 10 of the *Judicature Act*, 1875, applied, and therefore the unregistered bill of sale, as it would have been void against trustees in bankruptcy, must be void against the creditors of the estate.

It was admitted that the borrower was not a trader.

Cozens-Hardy, Q.C., and *Oswald*, for Messrs. *Myers*:—

The 10th section of the *Judicature Act*, 1875, does not apply the *Bills of Sale Act* to the administration of the assets of a deceased person: *Davis* v. *Goodman* (1). The rules of bank-

(1) 5 C. P. D. 128.

FRY, J.
1882
In re
COUNT
D'EPINEUIL
(1).
TADMAN
v.
D'EPINEUIL.

ruptcy are not applied in every respect by that section: *In re Coal Consumers Association* (1); *In re Albion Steel and Wire Company* (2); *In re Crumlin Viaduct Works Company* (3); *In re Richards & Co.* (4); *In re Withernsea Brickworks* (5); *Thomas* v. *Patent Lionite Company* (6); *In re Knott* (7).

G. Henderson, for the Plaintiff:—

A bill of sale which would be void against a trustee in bankruptcy is made void as against the other creditors of an insolvent estate by the 10th section of the Act: *In re Norton Ironworks Company* (8); *In re Stockton Iron Furnace Company* (9); *In re Summers* (10); *In re Association of Land Financiers* (11); *In re Hopkins* (12).

R. T. Wright, for the Defendant.

FRY, J.:—

The unregistered bill of sale of the 18th of June, 1881, though it would have been void as against trustees in bankruptcy, was not void as against the grantor himself, and, when he died, only the equity of redemption of the goods granted by the bill of sale was included in his assets.

It has been contended that the assets of this insolvent estate are to be enlarged, by virtue of the operation of the 8th section of the *Bills of Sale Act*, 1878, and the 10th section of the *Judicature Act*, 1875, by including the goods of the deceased which he had granted away by the bill of sale made to Messrs. *Myers*. But the words of the section are that the rules of bankruptcy are to be applied "in the administration of the assets." The assets in this case include only the equity of redemption of the goods comprised in the bill of sale; that may be administered as part of his estate; what belonged to other persons cannot be so

(1) 4 Ch. D. 625.
(2) 7 Ch. D. 547.
(3) 11 Ch. D. 676.
(4) Ibid. 676.
(5) 16 Ch. D. 337.
(6) 17 Ch. D. 250.
(7) 7 Ch. D. 549, n.
(8) 26 W. R. 53.
(9) 10 Ch. D. 335.
(10) 13 Ch. D. 136.
(11) 16 Ch. D. 373.
(12) 18 Ch. D. 370.

administered. *In re Knott* (1) is directly in point to shew that the rules in bankruptcy do not apply to make a bill of sale void against the unsecured creditors.

I am further fortified in my opinion by the decisions in the Court of Appeal which have been cited, especially *In re Withernsea Brickworks* (2). I grant this application on the ground that the section is not intended to enlarge the assets to be administered, but only to vary the rights of the persons entitled to the assets.

Solicitors: *G. J. & B. Vanderpump; S. G. Warner.*

(1) 7 Ch. D. 549. n. (2) 16 Ch. D. 337.

C. W. C.

KAY, J.

1882

March 4, 6, 7, 9.

WARNER *v.* JACOB.

[1881 W. 0176.]

Mortgage—Power of Sale—Redemption—Restraining Sale—Undervalue—Trustee.

If a mortgagee exercises his power of sale *bonâ fide* for the purpose of realizing his debt and without collusion with the purchaser, the Court will not interfere even though the sale be very disadvantageous, unless the price is so low as in itself to be evidence of fraud.

A mortgagee in exercising his power of sale is not (except as to the balance of the purchase-money after a sale) a trustee for the mortgagor even if the mortgage is in the form of a trust for sale.

Downes v. *Grazebrook* (1) and *Robertson* v. *Norris* (2) observed upon.

By an indenture of mortgage dated 5th of June, 1879, *J. Warner* in consideration of £3500 advanced to him mortgaged certain hereditaments in *Clerkenwell* (to which he was entitled under a building agreement) to *W. Jacob* and *J. W. Sherriff*, the trustees of the *Royal Benefit Building Society*, by way of security for the payment of all moneys due from *Warner* according to the regulations of the building society. The deed contained a power of sale in the usual form. *Warner* found difficulties in obtaining a lease under his building agreement, and became in arrear with his payments to the building society, who, on the 28th of May, 1880, took possession and incurred considerable expenses in connection therewith. On the 23rd of October the trustees of the building society gave notice to *Warner* that they intended to sell, and on the 8th of November they contracted to sell to *T. L. Boyd* for £5500. On the 19th of January, 1881, *Warner* brought this action against the trustees of the building society and against *Boyd*, the purchaser, alleging that he, *Warner*, was only temporarily in difficulties, and could have borrowed money to pay off the society; that he hoped to obtain a lease which would increase the value of the property, and that the sale was at an undervalue and made for the purpose of embarrassing him; and that the agreement with *Boyd* was not binding, and claiming redemption and damages. The trustees of the society denied that the sale

(1) 3 Mer. 200. (2) 1 Giff. 421.

was at an undervalue or made for any purpose except that of realizing; and *Boyd* denied all knowledge of anything else. Witnesses were examined, and a long correspondence was put in. The effect of the evidence appears from the judgment of the Court.

W. Barber, Q.C., and *P. Beale*, for the Plaintiff.

Rigby, Q.C., and *Speed*, for the trustees of the building society.

Higgins, Q.C., and *Maidlow*, for the purchasers.

March 9. KAY, J.:—

The action in this case is by a mortgagor against the mortgagees and a purchaser from them under their power of sale, asking to have the sale set aside, and for the usual decree for redemption.

A question has been raised as to the position of a mortgagee exercising his power of sale; upon which it is well to look back to the authorities. Sir *T. Plumer*, in *Cholmondeley* v. *Clinton* (1), says (2): "It is only in a secondary point of view and under certain circumstances and for a particular purpose that the character of trustee constructively belongs to a mortgagee. No trust is expressed in the contract; it is only raised by implication, in subordination to the main purpose of it, and after that is fully satisfied; its primary character is not fiduciary." And (3) "The ground on which a mortgagee is in any case, and for any purpose, considered to have a character resembling that of a trustee is the partial and limited right which in equity he is allowed to have in the whole estate legal and equitable. He does not at any time possess, like a trustee, a title to the legal estate distinct and separate from the beneficial and equitable. Whenever he is entitled at all to either, he is fully entitled to both; . . . . but in equity his title is confined to a particular purpose. He has no right to either, nor can make use of any remedy belonging to either, further than and as may be necessary to secure the repayment of the money due to him. When that is paid his duty is to reconvey the estate to the person entitled to it; it never remains in his

(1) 2 J. & W. 1. (2) 2 J. & W. 183.
(3) 2 J. & W. 184.

KAY, J.
1882
WARNER
v.
JACOB

hands clothed with any fiduciary duty. . . . The mortgagee is a mere indifferent stakeholder. The real contest lies between the competitors for the estate, which in the hands of either must continue subject to the mortgage till paid off; when paid off, the mortgage title ends, and then and not before the implied trust to surrender the estate to the person entitled to demand it begins."

In *Matthie* v. *Edwards* (1) the Vice-Chancellor *Knight Bruce* set aside a sale by mortgagees, but his decision was reversed by Lord *Cottenham*, who, in *Jones* v. *Matthie* (2), is reported as having said, "Such a power as this may, no doubt, be used for purposes of oppression, but when conferred it must be remembered that it is so by a bargain between one party and the other, and it is for the party who borrows to consider whether he is not giving too large a power to him with whom he is dealing. If the power is exercised for fraudulent purposes this Court will interfere, and as in other cases, if the party actually deposits in Court the amount due, it will not allow the power to be exercised at all." In *Davey* v. *Durrant* (3) Lord Justice *Turner* said: "The case made by the bill, and attempted to be made at the Bar, as to the sale to the Defendant *Packe* is this, that the sale was upon terms not warranted by the power of sale vested in the Defendant *Durrant;* that the price was grossly inadequate, so much so indeed as to amount to evidence of fraud; that the notice, which was the necessary preliminary to the sale, had become ineffectual and had been waived, and that the proper steps had not been taken for securing an advantageous sale. With many of these objections the Defendant *Packe*, as I apprehend, has no concern whatever. I agree that he was bound to see that the terms of the sale fell within the limits of the power, and of course he could not maintain a purchase made at a fraudulent undervalue; but except in these respects I apprehend that he cannot be affected. By the terms of the deed creating the power of sale he was absolved from inquiring whether the power had arisen; and I cannot go the length of holding that in the absence of fraud or collusion, a purchaser from a mortgagee with a power of sale is bound to inquire what steps have been antecedently taken for the purpose of promoting the sale."

(1) 2 Coll. 465. (2) 11 Jur. 504.
(3) 1 De G. & J. 535, 557.

In *Adams* v. *Scott* (1) a demurrer was allowed by Vice-Chancellor *Wood* to a bill alleging a contract by the mortgagees for the sale of a mortgaged estate at the price of £12,000, the estate being alleged to be worth £20,000 to £25,000. The Vice-Chancellor said that it was clear that the exercise of the power of sale could not be suspended by filing a bill to redeem. "The Plaintiff was bound to have shewn that the power, the existence of which he stated in his bill, had been exercised improperly or contrary to its terms, that there had been some fraud attending the sale and that the purchasers had notice of such fraud."

Besides these authorities there are the well-known cases of *Kirkwood* v. *Thompson* (2), supported by *Locking* v. *Parker* (3) and *In re Alison* (4), which have decided that even if the mortgage is in the form of a trust for sale, that is not a trust which the mortgagor can enforce and the mortgagee is not thereby made a trustee for the mortgagor.

Reliance was placed on the language of Vice-Chancellor *Stuart* in *Robertson* v. *Norris* (5), where he states that Lord *Eldon* had said that the mortgagee was a trustee for the mortgagor in the exercise of that power. The whole passage is this: "Lord *Eldon* says that the mortgagee is a trustee for the benefit of the mortgagor in the exercise of that power. That expression is to be understood in this sense, that the power being given to enable him to recover the mortgage money this Court requires that he shall exercise the power of sale in a provident way with a due regard to the rights and interests of the mortgagor in the surplus money to be produced by the sale. The legitimate purpose being to secure repayment of his mortgage money, if he uses the power for another purpose—from any ill motive to effect other purposes of his own or to serve the purposes of other individuals—the Court considers that to be a fraud in the exercise of the power, because it is using the power for purposes foreign to that for which it was intended." The reference is to *Downes* v. *Glazebrook* (6), but that case only decided that where the mortgage was in the form of a trust for sale the mortgagee could not buy.

(1) 7 W. R. 213.
(2) 2 H. & M. 392.
(3) Law Rep. 8 Ch. 30.
(4) 11 Ch. D. 284.
(5) 1 Giff. 421, 424.
(6) 3 Mer. 200.

KAY, J.
1882
WARNER
v.
JACOB

The result seems to be that a mortgagee is strictly speaking not a trustee of the power of sale. It is a power given to him for his own benefit, to enable him the better to realize his debt. If he exercises it *bonâ fide* for that purpose, without corruption or collusion with the purchaser, the Court will not interfere even though the sale be very disadvantageous, unless indeed the price is so low as in itself to be evidence of fraud.

His Lordship then stated the facts of the case and read the correspondence between the parties and commented on the evidence. His Lordship then said:—On the 19th of January, 1881, the writ in this action was issued, no tender of the mortgage money having been made, nor any attempt to stay the sale by injunction, which, according to the authorities I have cited and to *Whitworth* v. *Rhodes* (1), could only have been done by paying the money into Court. It is obvious from the evidence that the Plaintiff was quite unable to do this or to pay off the principal or the arrears of interest, unless he obtained the lease and a new mortgage as he hoped to do. But the mortgagees were under no obligation to wait for this, and had a perfect right to exercise their power of sale to realize their debt. They proposed to sell with his concurrence, but as he declined to concur they sold without it.

His Lordship then commented on the evidence as to undervalue, coming to the conclusion that no case of undervalue was made out, and that no doubt under the circumstances the sale to *Boyd* was the best thing the society could do. There was no evidence of any *mala fides* or collusion. The sale to *Boyd* could not be set aside, nor was there any case for damages in respect of the sale. So far as the action sought to affect the sale it must be dismissed with costs as against *Boyd* and as against the mortgagees. There must be the usual accounts in a redemption suit as against mortgagees in possession, and the purchase-money would come into that account.

Solicitors for Plaintiff: *Peace & Waller.*
Solicitors for Defendants: *W. Rutter*; *Stones & Co.*

(1) 20 L. J. (Ch.) 105.

C. M.

CARTER *v.* WHITE.

KAY, J.

1882

March 10, 11, 14.

[1880 C. 115.]

Bill of Exchange—Accepted but not signed by Drawer—Death of Acceptor.

A bill of exchange accepted for valuable consideration with the drawer's name left blank may be completed by the drawer's name being added after the death of the acceptor.

THIS action was brought by the trustee in bankruptcy of *Noble*, who, according to the admission in the statement of defence, had on the 19th of November, 1874, deposited with the Defendant, Sir *Thomas White*, the certificates of £505 stock in the *Chigwell Gas Company* as collateral security for a debt of £500 due to Sir *Thomas White* from *James Edwin Randle*. This deposit was made in consideration of the renewal by the Defendant of two acceptances of *Randle*, one for £250, part of such debt, dated the 18th of November, 1874, payable three months after date, and another for the remainder of the debt, dated the 15th of October, 1874, payable two months after date.

Both these bills of exchange, after being accepted by *Randle*, were delivered to Sir *Thomas White* duly filled up, except only that the name of the drawer was not added.

Randle died on the 6th of January, 1875, leaving his widow his executrix. On the 23rd of July, 1879, *Noble* became bankrupt, and on the 16th of March, 1880, his trustee in bankruptcy commenced this action, claiming to be relieved from his suretyship.

Higgins, Q.C., and *Bradford*, for the Plaintiff:—

We submit that the surety is discharged from his suretyship by reason of the laches of the Defendant in keeping the bills of exchange uncompleted in his hands until after the death of the acceptor. A bill of exchange without a drawer's name is worthless. It was held in *Stoessiger* v. *South Eastern Railway Company* (1) that such a bill was merely a writing of no value. Lord

(1) 3 E. & B. 549.

KAY, J.
1882
CARTER
v.
WHITE.

Campbell there said (1), "It empowered a particular individual to claim to that amount by putting his name to it, but that had not been in fact done by the individual, *Goold*. I cannot agree that the executors of *Goold* could have made it valuable by putting to it his name, or their own, or any name whatever." *McCall* v. *Taylor* (2) was decided on the same principle. Any one deriving authority from the acceptor may make a bill complete by adding his name: *Schultz* v. *Astley* (3); but that is on the ground of agency, and the power of an agent ceases on the death of the principal. A power of attorney is instantly revoked by the death of the grantor: *Watson* v. *King* (4). The drawer is agent for the acceptor in this way: The bill is delivered in blank, and no one has a right to complete it except with the consent of all parties to the transaction. The name of the drawer can only be added after the transaction takes place, by implication of agency, and that can only be shewn to have taken place during the life of the principal. It tends to a fraudulent use of a bill of exchange by issuing an imperfect instrument. A surety is entitled to the benefit of the securities in the hands of the creditor: *Strange* v. *Fooks* (5); and a surety will be discharged to the amount of the security lost or not perfected by the creditor: *Capel* v. *Butler* (6); *Bonser* v. *Cox* (7). We have lost the securities by the negligence of the creditor in not having the bills perfected. The bill must be a completed bill of exchange at the time the question arises. The right of a surety is to have the security in exactly the same plight and condition in which it stood in the creditor's hands: *Pledge* v. *Buss* (8); *Watts* v. *Shuttleworth* (9).

Rigby, Q.C., and *Shebbeare*, for the Defendant:—

There is abundant authority to shew that a bill of exchange may be filled in after the death of the acceptor.

In *Dutch* v. *O'Leary* (10) it was held that a bill of exchange accepted in blank in the hands of any *bonâ fide* owner may be signed by the drawer at any time. *Montague* v. *Perkins* (11), *Harvey*

(1) 3 E. & B. 557.
(2) 19 C. B. (N.S.) 301.
(3) 2 Bing. N. C. 544.
(4) 4 Camp. 272.
(5) 4 Giff. 408.
(6) 2 S. & S. 457.
(7) 4 Beav. 379; 6 Beav. 110.
(8) Joh. 663.
(9) 5 H. & N. 235; 7 H. & N. 353.
(10) 5 Ir. L. Rep. (Eq.) 92.
(11) 22 L. J. (C.P.) 187.

v. *Cane* (1), and *Scard* v. *Jackson* (2), are to the same effect. *Armfield* v. *Allport* (3) is a strong authority that the drawer may sign whenever he finds it convenient to do so.

[They also referred to *White & Tudor's* Leading Cases (4) and *Byles* on Bills (5).]

March 14. KAY, J.:—

This case raises a question of some novelty. The chief ground relied upon on behalf of the Plaintiff is that the Defendant, Sir *Thomas White*, had not at the commencement of this action filled in his name as drawer of the two bills of exchange, and that he cannot do so now after the death of *Randle*, the acceptor of the bills, and that he is not therefore in a position to hand over those bills of exchange to the Plaintiff as complete securities.

It cannot be denied that if an acceptance, blank as to the name of the drawer, be handed to the proposed drawer for valuable consideration, the drawer, or his executor after his death, as in *Scard* v. *Jackson* (6), or an indorsee for value, as in *Harvey* v. *Cane* (7), may complete the bill by inserting his own name as drawer, and this after the bill has become due.

In *Armfield* v. *Allport* (8) Chief Baron *Pollock* says: "A man who writes his name across a stamped paper as acceptor, there being a direction to him upon the paper, is liable. He gives his authority to anybody to draw upon him when it may be convenient to do so, or when the person to whom the paper is given may think it advisable to apply it for this purpose."

In *Montague* v. *Perkins* (9) a bill accepted in blank was held good in the hands of an innocent holder for value, though filled up by the drawer twelve years after it was given, and dated the year in which it was so filled up.

The argument in this case was founded very much upon the language in the judgment of the last-mentioned decision, which treats the drawer as agent for the acceptor. However, that was a

(1) 34 L. T. 64.
(2) 34 L. T. 65, n.
(3) 27 L. J. (Ex.) 42.
(4) Page 1027.
(5) 11th Ed. p. 187.
(6) 34 L. T. 65, n.; 24 W. R. 159.
(7) 34 L. T. 64; 24 W. R. 400.
(8) 27 L. J. (Ex.) 42, 44.
(9) 22 L. J. (C.P.) 187.

KAY, J.
1882
CARTER
v.
WHITE.

document entirely blank except the acceptance, and the whole body of the bill, date, and amount, and time of payment, was filled in by the drawer, and as far as the amount and date are concerned the drawer might be considered in some sense an agent. That is not the case here; the bills, I understand, were perfect when delivered, except only the drawer's name, and I cannot see how the drawer, who has given value to the acceptor, can be his agent to sign his own name as drawer.

If there was agency it is argued that the case comes within the principle of authorities like *Watson* v. *King* (1), which decide that under a power of attorney, though coupled with an interest, no valid act can be done in the name of the donor after his death. But here, even if the drawer could be considered *Randle's* agent, nothing is to be done in the name of *Randle* to complete this bill.

In *Usher* v. *Dauncy* (2) a bill of exchange drawn and indorsed in blank by a partner, and delivered by him to a clerk of the firm, who after his death filled it up with the date, sum, and names of other parties in the counting-house of the person who accepted it, was held to be a good bill in the hands of persons who had discounted it, and to bind the surviving partners.

In *Hatch* v. *Searles* (3), an accommodation acceptance was given in blank and filled up after the death of the acceptor, and handed to a person who knew it had been given as a blank acceptance. It was proved that the person to whom it was first given in blank had no right to get it discounted, and that the person who discounted it knew, or must be taken to have known, this, and therefore he could not recover. In the marginal note (4) this case is stated as a decision that the drawer might fill up the bill after the acceptor's death. No direct decision was given on the point, but it seems to have been assumed by the Vice-Chancellor and in the Court of Appeal, that if the transaction had been *bonâ fide* the holder might have recovered, notwithstanding the acceptor's death before the bill was filled up. This case is quoted in the last

(1) 4 Camp. 272.
(2) Ibid. 97.
(3) 2 Sm. & Giff. 147; on appeal, 3 W. R. 49.
(4) 2 Sm. & Giff. 147.

edition of *Byles* on Bills (1) as an authority for the proposition that a blank acceptance for value is irrevocable.

The very point seems to have come before the Vice-Chancellor in *Ireland* in *Dutch* v. *O'Leary* (2), where it was held that the drawer's name might be filled in after the death of the acceptor. That decision seems to me consistent with principle, and I follow it by overruling this objection. In this case the objection is merely technical, as no relief can, I understand, be had against *Randle's* estate.

Some other points were raised which I do not now notice, as they were disposed of in the course of the argument.

I must dismiss the action with costs, except so far as it seeks an account against Sir *Thomas White*. There must be an account of the debt and of the proceeds of the security, which has been realized, and liberty to apply as to the balance and subsequent costs.

Solicitors for Plaintiff: *Wild, Brown, & Wild.*
Solicitor for Defendant: *A. T. Hewitt.*

(1) Page 191. (2) 5 Ir. L. Rep. (Eq.) 92.

T. W. G.

C. A.
1881
KAY, J.
April 5, 6, 8,
C. A.
Nov. 28.

In re BAKER.
COLLINS *v.* RHODES.
[1879 B. 622.]
In re SEAMAN.
RHODES *v.* WISH.
[1879 S. 553.]

Breach of Trust—Devastavit—Specialty Debt—Covenant—Waiver—Laches.

There is no rule in equity, any more than at law, that the mere non-suing by a specialty creditor for any period within the statutory limit of twenty years is such negligence as deprives him of the right of requiring payment of the specialty debt.

S. covenanted with *B.* for immediate payment of a sum of money in exoneration of *B.*, and in substitution for a similar sum which *B.* was liable to pay within six months of his death.

S. died without having paid, or been called on to pay that sum, leaving property amply sufficient to meet it, but her executor, instead of providing out of her estate funds to meet the liability on her covenant, left her estate, consisting entirely of shares in a bank, which afterwards failed, unconverted. The investment in bank shares was authorized by the will of *S.*:—

Held (reversing the decision of *Kay*, J.), that the executors of *B.* were entitled, after a lapse of 18½ years, to enforce that covenant against the estate of *S.*, and that the executor of *S.*, having committed a *devastavit* in not converting the shares to provide for payment of the debt, was liable to make good the amount for which his testatrix was so liable under her covenant.

UNDER the marriage settlement of *Jane Seaman* and *Thomas Baker*, dated the 4th of March, 1859, and made between *Charlotte Seaman*, widow (mother of *Jane Seaman*), of the first part, *Jane Seaman* of the second part, *Thomas Baker* of the third part, and *William Trump Wish* and *John Harris*, trustees, of the fourth part, certain property stood vested in the trustees upon trust, in the events which had happened, for *Thomas Baker* for life, with remainder to *Jane Seaman* for life for her separate use without power of anticipation, with remainder to *Charlotte*, the only child of the marriage, subject, in the events which had happened, to a power in *Jane Seaman* to appoint the property among her daughter *Charlotte* and any issue of hers as therein mentioned. And *Thomas Baker* in the said settlement covenanted with the said

trustees for payment to them of the sum of £500 within six months from his decease, with interest at £4 per cent. from his death, to be held upon trusts for his wife and daughter which were similar to those above mentioned.

Charles Baker was appointed trustee of the settlement by deed of the 13th of March, 1860, in the place of *Harris*, and the covenant was assigned to *Wish* and *Baker*.

By a separation deed of the 14th of March, 1860, made between *Thomas Baker* of the first part, *Jane Baker*, his wife, of the second part, and *Charlotte Seaman* and *William Trump Wish* of the third part, *Thomas Baker* agreed to let his wife live separate and enjoy for her separate use all her present and future property, and gave in favour of *Jane Baker* and assigned to *Charlotte Seaman* and *W. T. Wish* all his life and other interests in the settlement funds to the intent that the same might be held in trust for *Jane Baker*, and *Thomas Baker* thereby released all his powers of appointment vested in him over the settlement funds. And it was witnessed that, in pursuance of an agreement thereinbefore recited, and in consideration of the premises and especially of the delivery up by *Thomas Baker* to *C. Seaman* of two promissory notes of hers for £60 and £440 for cancellation, she, the said *C. Seaman*, covenanted with *Thomas Baker*, his trustees, executors, and administrators, that she, her executors or administrators, would immediately after the execution of those presents pay to the trustees of the settlement, "they having consented to receive and hold the same," the sum of £500, to be held by them upon and subject to the like trusts, powers, and authorities as were declared concerning the trust funds comprised in the settlement, which were to take effect from and after the determination of the life estate or other interest of *Thomas Baker* therein.

And *Charlotte Seaman* declared and agreed (*Jane Baker* also consenting) that if the events should happen on which the £500 covenanted to be paid by *Thomas Baker* in the settlement would become payable, then the £500 covenanted to be paid by *Charlotte Seaman* should be substituted for, or be liable to make good the sum of £500 covenanted to be paid by *Thomas Baker* to the intent that the heirs, executors, or administrators or the estate of *Thomas Baker* should be exonerated from the payment thereof.

C. A.
1881
In re BAKER.
COLLINS v. RHODES.
In re SEAMAN.
RHODES v. WISH.

Charlotte Seaman died on the 26th of January, 1869, without having paid, or having been required to pay, this £500.

By her will, dated the 24th of February, 1866, she gave all her estate to *William Trump Wish* and *Charles Baker*, whom she appointed her executors, in trust for her daughter *Jane Baker* for life, for her separate use without power of anticipation, with remainder in trust for her granddaughter *Charlotte* and her issue.

Wish alone proved the will.

Charlotte Seaman's estate consisted entirely of 200 shares in the *West of England* and *South Wales District Bank*, worth, at the time of her death, £3500. These shares were assignable by deed of transfer, registered in the books of the bank. *Wish*, being anxious to avoid the unlimited liability attaching to these shares, did not obtain a transfer of them into his own name, but on the 8th of March, 1869, registered the probate of the will at the bank, and the dividends were paid to him until the 17th of February, 1871, when he authorized the bank to pay them direct to *Jane Baker*, who under that authority received dividends up to July, 1878. The dividends received by her direct from the bank exceeded £1000.

On the 6th of December, 1878, the bank suspended payment. The shares were admitted to be an investment authorized by the will.

In 1875 *Charles Baker* died, and *W. T. Wish* thereupon became the surviving trustee of the settlement as well as of the will.

W. T. Wish died on the 18th of October, 1877, having appointed *Emma Ann Wish*, *Thomas Wish*, and *Edward R. Wish*, executors. His executors thus became the legal personal representatives of Mrs. *Seaman*.

On the 15th of February, 1878, *Thomas Baker* died, having appointed *Rhodes* and *Andrews* (the Plaintiffs in the second action) his executors.

The trustees of the settlement, at the time the £500 became payable by *Thomas Baker* under his covenant (the 15th of August, 1878), were *Collins* and *Pitt*, the Plaintiffs in the first action—who had been appointed by deed of the 18th of April, 1878. On their appointment the separation deed was handed to them—but

there was no assignment to them of the said sum of £500 or of the covenant of *Thomas Baker*.

By an indenture dated the same 18th of April, 1878, made between *J. Baker* of the one part and *Collins* and *Pitt* of the other, *Collins* and *Pitt* were appointed trustees of the will of Mrs. *Seaman* under a power contained in the will.

The deed contained a recital: "And whereas all the residuary property of the said testatrix, subject to the trusts of her said will, consists of 200 shares in the capital stock of the *West of England and South Wales District Bank* which were standing in her name at the time of her decease, and it is intended forthwith to transfer the same to the said *Collins* and *Pitt*." Then followed the appointment by *Jane Baker* of *Collins* and *Pitt* as trustees, with all the powers of the original trustees, and *Collins* and *Pitt* declared their acceptance of the said appointments and trusts.

On the execution of this deed the executors of *Wish* handed to the new trustees the certificates of the shares for which they gave a receipt, but they did not have the shares transferred into their names, nor were they registered as shareholders of the bank.

They subsequently declined to act as trustees of Mrs. *Seaman's* will, but no new trustees having been appointed till the 21st of November, 1878, the Court held that they must be treated as the trustees for the period from the 18th of April to the 21st of November, 1878.

On the 13th of July, 1879, *Collins* and *Pitt* applied to the executors of *Thomas Baker* for payment of the £500, suggesting at the same time that Mrs. *Seaman's* estate would be primarily liable, but, not having received payment, they, on the 27th of November, 1879, brought the first action against *Rhodes* and *Andrews*, the executors and trustees of *Thomas Baker*, for the administration of his real and personal estate. In this action they joined, as co-Defendants, the executors of *William Trump Wish*, as the persons in whom the legal right to sue for the debt and interest was vested, but who had refused to assign the same to the Plaintiffs, or join as co-Plaintiffs in the action.

In this action *Rhodes* and *Andrews* put in a defence and counterclaim, to which they made the Plaintiffs and *Jane Baker* Defendants, which for the present report need not be stated.

C. A. 1881 — *In re* BAKER. COLLINS *v.* RHODES. — *In re* SEAMAN. RHODES *v.* WISH. —

The executors of *Thomas Baker* admitted assets, but Mrs. *Seaman's* had no estate.

The action of *Rhodes* v. *Wish* was instituted on the 12th of December, 1879, by *Rhodes* and *Andrews* against the said *Emma Ann Wish*, *Thomas Wish*, and *Edward Richard Wish*, as legal personal representatives of *William Trump Wish* and also of *Charlotte Seaman*, claiming, as specialty creditors of *Charlotte Seaman*, the recovery of the specialty debt of £500 and interest under her covenant, and also an order for payment against the Defendants out of their testator's assets, on the ground of a breach of trust committed by *William Trump Wish* by not requiring payment of the £500 during *Charlotte Seaman's* life, and of a *devastavit* by paying to *Jane Baker*, or permitting her to receive, the income of *Charlotte Seaman's* residuary estate, without providing for the specialty debt and interest thereon.

The executors, by their defence, denied that *William Trump Wish*, as the trustee of the separation deed, or that he and *Charlotte Baker*, as the trustees of the marriage settlement, had any right to enforce the covenant, and alleged that *Thomas Baker* and *Jane Baker*, or one of them alone, had the right to enforce it, and that, if it was not enforced, it was owing to the laches and negligence of *Thomas Baker* and *Jane Baker*, and further, that it was not the duty of *William T. Wish*, as sole acting executor of the will of *Charlotte Seaman*, to receive or invest the £500, or pay interest thereon out of her assets before assenting to legacies under her will which were paid, not out of the testatrix's estate, but by *Jane Baker*. They further alleged that if *W. T. Wish* did in fact commit any breach of trust or *devastavit*, the same were respectively contributed to and caused by the laches and negligence of *Thomas Baker*, and that the Plaintiffs, as claiming under him, could not charge the Defendants or their testator's estate therefor. By their counter-claim, to which they made *Collins* and *Pitt* and *Jane Baker* Defendants, they claimed that *Collins* and *Pitt* might contribute equally with them to all damages that might be recovered in *Collins* v. *Rhodes*; that *Jane Baker* might recoup them any moneys recovered against them in *Collins* v. *Rhodes*; that the income of any moneys recovered in *Collins* v. *Rhodes* and of the trust funds comprised in the settlement or deed of separa-

tion during the life of *Jane Baker* might be impounded to make good all moneys recovered against them in *Collins* v. *Rhodes*.

The two actions came on for trial before Mr. Justice *Kay* on the 5th, 6th, and 8th of April, 1881.

Higgins, Q.C., and *Freeman*, for *Collins* and *Pitt*.

Glasse, Q.C., and *Colt*, for *Rhodes* and *Andrews*.

J. Pearson, Q.C., and *Blackmore*, for *Wish's* executors.

Locock Webb, Q.C., and *Tremlett*, for *Jane Baker*.

KAY, J., having disposed of various points in the two actions, held that there was no defence to the action against the executors of *Thomas Baker* for enforcing his covenant to pay £500, and gave judgment against his executors for payment, within one month, of that sum and interest from his death. His Lordship stayed all proceedings against Mrs. *Seaman's* estate, and proceeded to consider the claim of *Rhodes* and *Andrews* against the executors of *William Trump Wish*, and, after holding that *Wish* did not, as trustee of the settlement, commit any breach of trust in not enforcing the liability on Mrs. *Seaman's* covenant, continued:—

Then was there or not a *devastavit* as to the capital of the shares? The *devastavit*, if any, was committed by handing over, on the 18th of April, 1878, the certificates of those shares to *Collins* and *Pitt*, the new trustees of the marriage settlement. Of course the *devastavit* was only on that day; the *Statute of Limitations* does not apply, and *Thorne* v. *Kerr* (1), in my opinion, has no application in this case. Now was that a *devastavit* or not? I understand a *devastavit* to be committed when executors, either by an act or by negligence, put the estate into such a position that it becomes lost to a creditor. Did *Wish* do any act which has lost this estate, or any part of it, to the creditor, *Thomas Baker*, or his executors? It is obvious that the estate has been lost, not by any act of his, but by the failure of the bank; it is obvious, also, that by the placing of the certificates in the hands of the trustees, the executors of Mrs. *Seaman* never lost control over the shares at all; that at this moment, if the shares had not been

(1) 2 K. & J. 54.

C. A. 1881 — *In re* BAKER. COLLINS *v.* RHODES. — *In re* SEAMAN. RHODES *v.* WISH. — Kay, J.

destroyed by the failure of the bank, the executors of Mrs. *Seaman* would have the control of the shares quite sufficiently to compel the debt to be paid out of them. I therefore hold that there was no *devastavit* as to the capital of the shares by any act of the executors of Mrs. *Seaman*. Was there any *devastavit* by negligence as to the capital? That might have been a very different question to deal with, but then there is this counter-consideration —no creditor, as I understand the law, can make out against an executor a case of *devastavit* by negligence where the creditor has been guilty of equal negligence, and here *Thomas Baker* in all his lifetime never took any steps at all to enforce the covenant of Mrs. *Seaman* with him; his executors, after his death, never took any steps to enforce it, and it would be a very serious thing, indeed, if in a Court of Equity those persons who have been negligent for so many years, namely, from the 14th of March, 1860, and who only come now, almost at the end of twenty years, and first make their claim to enforce that covenant, were allowed to say to the executors, "Although we cannot prove you ever knew of the covenant, although we must admit that no application was ever made to you, yet, because you had constructive notice of it, we will fix you with a *devastavit* which has really been occasioned by our own negligence." I therefore hold that *devastavit* by negligence as to the capital of the shares is out of the question, because it is answered by the very much greater negligence of the persons who are asserting the claim of *devastavit*. That disposes of the claims against *Wish's* executors, because the rest of this claim is a claim for *devastavit*, because they paid over the dividends of the shares to Mrs. *Baker*. Whose fault was it that they paid them over? *Thomas Baker* or his executors not having given any notice or taken any steps, but having by their conduct misled the trustees (even if they knew of the covenant) into the very reasonable belief that it was never intended to enforce it. how they, after conduct of that kind, can come and assert against the executors that they had been guilty of *devastavit* by handing over the dividends to Mrs. *Baker*, I am entirely at a loss to see. It is contrary to the commonest principles of a Court of Equity to hold that there is any right of that kind in a person who has been equally negligent. Authorities will be found in *Williams* on

Executors (1). I refer, also, to the well-known case of *Ridgway* v. *Newstead* (2), which was a case of an attempt to make a legatee refund, which was defeated by the negligence of the person who otherwise would have had the right. That case is reported on appeal (3), and to that report I refer.

C. A. 1881 *In re* BAKER. COLLINS *v.* RHODES. *In re* SEAMAN. RHODES *v.* WISH.

His Lordship accordingly ordered *Rhodes* and *Andrews* to pay within a month the £500 covenanted by *Baker* to be paid, with interest at 4 per cent. from his death, and the costs, and dismissed their action against *Wish's* executors with costs.

T. W. G.

Rhodes and *Andrews* appealed. The appeal was heard on the 28th of November, 1881.

C. A.

Glasse, Q.C., and *Colt*, for the Appellants:—

It was the duty of *Wish*, as the sole acting executor of Mrs. *Seaman's* will, to provide for the payment of the specialty debt of £500 before assenting to any legacy, and allowing *Jane Baker* to receive the dividends arising from the residuary estate. As trustee of the separation deed he was well aware that Mrs. *Seaman* had not paid the money under her covenant. The Judge below seems to have held that our claim was ousted by laches on the part of *Thomas Baker*, but there is no rule limiting the time within which a specialty creditor should assert his claim short of the statutory period.

[They were stopped.]

J. Pearson, Q.C., and *Blackmore*, for *Wish's* executors:—

Assuming that as against Mrs. *Seaman's* estate there is no answer, still, as regards the claim against *Wish* for a *devastavit*, we submit that the decision of the Judge was right.

Thomas Baker, in whose favour the covenant was made, during all the period from 1860 to 1878, by his own acts gave his sanction to the non-enforcement against *Charlotte Seaman*, and, after her death, to the retainer by her executors of this debt. He must be presumed to have waived his claim. If *Wish* committed a *devastavit* as executor, it was by not converting the shares within one year from Mrs. *Seaman's* death, and a claim on a *devastavit*

(1) 6th Ed. p. 1694.

(2) 2 Giff. 492.

(3) 30 L. J. (Ch.) 889.

C. A. 1881

In re BAKER. COLLINS *v.* RHODES.

In re SEAMAN. RHODES *v.* WISH.

is only a simple contract claim and barred by the lapse of six years: *Thorne* v. *Kerr* (1).

Higgins, Q.C., and *Freeman*, for *Collins* and *Pitt*.

Locock Webb, Q.C., and *Tremlett*, for *Jane Baker*.

JESSEL, M.R.:—

This is an appeal from a decision of Mr. Justice *Kay*, and he seems to have decided that mere delay on the part of a specialty creditor in not suing on his specialty for eighteen years deprived him of his right to sue in a Court of Law. There is really nothing else in the case. There is no distinction on this point between equity and law. If the statute has run, then the debt or claim is barred; if not, then there is nothing else to be said in the case; there is no answer to a creditor in equity any more than at law. If instead of the action being in this Court it had been brought in the Queen's Bench on this specialty, could the Defendant have had any defence short of making good the plea of *plene administravit?* Could he have moved for an injunction to restrain the creditor from prosecuting the action on the ground of delay? for if he could not, then he could not succeed here. The creditor here may have relied on the very terms of the statute; he may have said, "I have plenty of time. I will not annoy my mother-in-law. I will leave it to my executors to take the necessary steps." There is no hardship in this on the debtor; the debtor can always pay; and I cannot see how there is any negligence in the creditor in not suing, which is not greater negligence in the debtor in not paying.

[His Lordship referred to the covenant by *Thomas Baker*, and continued:—]

Then a deed of separation was executed, *Thomas Baker* gave consideration, and he received from his mother-in-law a covenant to pay the sum of £500 at once, in exoneration of his covenant to pay £500 at his death. For some reason Mrs. *Seaman* did not perform her covenant, Mr. *Baker* did not think fit to sue her; years passed on, Mrs. *Seaman* died, then *Baker* died. Then we find a Mr. *Wish*, the surviving trustee of the marriage settlement

(1) 2 K. & J. 54.

and sole surviving executor of the will of Mrs. *Seaman*, who was also a party to the separation deed, and therefore well aware of the existence of the covenant of Mrs. *Seaman*, and, as trustee of the settlement, also well aware that that covenant had not been satisfied. Mr. *Wish* is found in possession of shares in the *West of England Bank* worth five times the amount of the sum covenanted to be paid. For some reason or other Mr. *Wish* did not pay the debt. Three years afterwards the bank fails, and thereupon the executors of Mr. *Baker*, who represent the covenantor in the marriage settlement, and as to whom the time of twenty years had not expired, are called on to provide the sum of £500 which had been so covenanted to be paid. Of course they have no defence —they must pay. They in turn sue *Wish's* executors, to make his estate liable for not realizing a sufficient amount of the bank shares to pay the amount of the debt. What defence have they to that action? I cannot say. Their testator was liable to pay this debt of his testatrix; he has not paid it, and the debt is not barred by statute. He cannot shew that he has duly administered assets. On the contrary, it appears that he has kept the shares unconverted. It is practically an undefended case. The Judge, in treating the mere non-suing by a specialty creditor for a period of eighteen years to be such negligence as to disentitle him to succeed in his claim now, came to a wrong decision, and the appeal must be allowed.

BAGGALLAY, L.J., stated the facts, and proceeded:—

When Mrs. *Seaman* died in 1869 her son-in-law was a specialty creditor upon her estate for a sum of £500. *Wish* was her sole acting executor. He was aware of the existence of the debt. He took no steps to pay or provide for the payment of the debt, but kept under his control perishable property, viz., bank shares. I cannot understand on what ground his executors can resist the claim of *T. Baker's* executors to make good the amount which they have been made to pay.

LUSH, L.J.:—

I am of the same opinion. It is new to me that a specialty creditor who takes no steps to recover his specialty debt for

C. A. 1881 — *In re* BAKER. COLLINS *v.* RHODES. — *In re* SEAMAN. RHODES *v.* WISH.

eighteen years can be held guilty of negligence so as to lose his right to payment when he is allowed by the statute twenty years within which to recover his debt.

Solicitors for Appellants: *Pattison, Wigg, & Co.*, agents for *Andrews, Barrett, & Andrews, Weymouth.*

Solicitors for *Wish's* executors: *Cooke & Jonas*, agents for *Drake, Exeter.*

Solicitors for other Parties: *Makinson & Carpenter*, agents for *Burrow, Collumpton.*

M. W.

C. A. 1881 — *Nov.* 30; *Dec.* 1.

FOWLER *v.* BARSTOW.

[1881 F. 1702.]

Practice—Leave to serve Writ out of Jurisdiction—Admissibility of Evidence—Rules of Court, 1875, *Order* XI., *rr.* 1, 1*a*, 3.

Where a Plaintiff has obtained leave under Order XI. to serve a writ out of the jurisdiction, and the Defendant moves to discharge the order, affidavits are admissible to contest the question whether the cause of action arose within the jurisdiction.

Great Australian Gold Mining Company v. *Martin* (1) overruled on this point.

The sufficiency of the Plaintiff's affidavit under Order XI., r. 3, considered.

In cases where the Defendant is resident in *Scotland* or *Ireland*, the omission of the statement that he is a British subject is not material.

Rule 1a, of Order XI., giving a discretion to the Judge when the Defendant resides in *Scotland* or *Ireland*, only relates to actions on contracts and will not be applied to other actions.

THIS action was brought by the Plaintiff, *A. Fowler*, who lived in *London*, against *Charles Murray Barstow*, who resided in *Edinburgh*, to recover a sum of money which he, *Fowler*, had paid to the Defendant and two other persons named *Robert Larchin* and *James Joseph Lynch*, for an interest in the *Rhydygaled Colliery*, in *Wales*. The Plaintiff founded his claim upon alleged misrepresentations made by these persons as to the value of the colliery and the sum which it had cost them.

(1) 5 Ch. D. 1.

On the 6th of October, 1881, the Plaintiff obtained an order on an *ex parte* application before the Vacation Judge giving him leave to serve the writ on the Defendant in *Scotland*. The application was supported by an affidavit in which the Plaintiff stated that he was induced to purchase the interest in the colliery in the month of November, 1875, for the sum of £1125, by the misrepresentations of the Defendant, and the other two persons named; and then swore "that the whole of the negotiations which resulted in his paying the said sum of £1125 took place in the City of *London* within the jurisdiction of the Court." He stated that the Defendant resided in *Edinburgh*, but did not state whether he was or not a British subject.

The writ having been served, the Defendant entered a conditional appearance, and moved before Mr. Justice *Chitty* on the 11th of November to discharge the order of the Vacation Judge; and in support of his application filed an affidavit denying the allegations contained in the Plaintiff's affidavit, and expressly stating that he had never entered into any negotiations at all with the Plaintiff, or authorized any negotiations to be entered into with him, nor made any representations to him about the colliery, and that he had never received any money from him. He also stated that he was not in *London* in the latter part of the year 1875, and never saw the Plaintiff in his life till February, 1876, when he met him at *Mold* in *Wales*.

The Plaintiff filed an affidavit in reply to the Defendant's affidavit, in which he said that the representations by which he was induced to take the shares in the colliery were made to him by *Lynch* and *Larchin*, adding, "I was further informed by them, who I claim were the agents of the Defendant in the representations they made to me, that they were in communication with the Defendant as to the terms upon which I should be sold an interest in the colliery."

Mr. Justice *Chitty* did not allow the Defendant's affidavit or the Plaintiff's affidavit in reply to be read, and refused the application to discharge the order for service.

The Defendant now renewed the application in the Court of Appeal.

C. A. 1881 FOWLER v. BARSTOW.

Crossley, Q.C., and *Birrell*, for the Appellant:—

The Plaintiff's affidavit on which the order for service was made was insufficient. By Order XI., r. 3, the affidavit ought to state whether the Defendant is a British subject or not. There was no such statement in this affidavit.

In the next place, taking all the affidavits together, the Plaintiff does not state and pledge his belief that there is a good cause of action within the jurisdiction: *Great Australian Gold Mining Company* v. *Martin* (1). Our affidavit in answer to the Plaintiff's ought to be admitted, as it is necessary that the Court should know whether it is true that the Plaintiff has some cause of action within the jurisdiction, or not. It was allowable for this purpose under the old Chancery practice to disprove by affidavit the Plaintiff's allegations: *Foley* v. *Maillardet* (2); *Hawarden* v. *Dunlop* (3); *Maclean* v. *Dawson* (4). Moreover, having regard to rule 1*a*, of Order XI, the Plaintiff ought to set forth such particulars as will shew that is desirable to try the action in this country: *Tottenham* v. *Barry* (5).

Grosvenor Woods (*Graham Hastings*, Q.C., with him), for the Plaintiff:—

The defect of the affidavit in not stating that the Defendant is a British subject is immaterial. He is within the British dominions, and therefore it makes no difference whether he is a British subject or not. A sufficient cause of action is shewn as arising in this country. The Plaintiff's original affidavit was sufficient to shew a cause of action in this country. By the old Chancery practice the issue of the writ was based upon the statements in the bill, and could only be contested on special grounds after the Defendant had put in a conditional appearance: *Foley* v. *Maillardet*.

[THE COURT held that the affidavits by the Defendant and by the Plaintiff in reply might be put in; and they were accordingly read.]

(1) 5 Ch. D. 1.
(2) 1 D. J. & S. 389.
(3) 2 Dr. & Sm. 155.
(4) 4 De G. & J. 150.
(5) 12 Ch. D. 797.

Now that the statement of the Defendant is fully before the Court, there still appear sufficient grounds for the issue of the writ. It is impossible to try the question of jurisdiction fairly on affidavits now, and if we have to issue a fresh writ in *Scotland* we shall be barred by lapse of time.

JESSEL, M.R.:—

This matter, no doubt, has been much more fully and completely discussed before us than it could be before Mr. Justice *Chitty* on a motion day, and therefore in coming to a different conclusion to that at which the learned Judge has arrived, I am not sure that we are really deciding adversely to anything he decided.

Now, first of all, it is very important to see what the practice is under the *Judicature Act*.

The preface, if I may call it so, to the rules under the *Judicature Act* is this: "Where no other provision is made by the Act or these rules the present procedure and practice remain in force." It did sometimes happen that the practice in the Court of Chancery was different from the practice in the Courts of Common Law, and therefore when they were amalgamated, so to say, under the *Judicature Act*, it became important to consider what the practice was to be. The Appeal Court decided that in those cases the better practice was to be adopted, and, of course, it was only the Appeal Court that could decide which was the better practice; but where the practice was the same there of course the practice remains unaltered.

Now it appears that under the *Common Law Procedure Act*, which was rather stricter than is the rule under the *Judicature Act* as to service out of the jurisdiction, it was the practice to allow the defendant to put in a conditional appearance and to file affidavits shewing that there was no cause of action within the jurisdiction. That was the ground on which the affidavits proceeded, and if the Court were satisfied that there was no cause of action within the jurisdiction they discharged the order for service out of the jurisdiction. If the Court doubted, they adopted this practice: they put the plaintiff under an undertaking that if it appeared at the trial that there was no cause of action within the

C. A. 1881 FOWLER v. BARSTOW. Jessel, M.R.

jurisdiction, then, although there might be a cause of action, he was to submit to have his action dismissed. That seems to have been the practice. As regards Equity the practice was equally well settled. In Equity the rules, if I may say so, as to service out of the jurisdiction were more lax before the *Judicature Act* than the rule under the *Judicature Act*. The Court simply looked into the bill, and issued the order on the statements in the bill, to which it gave credit as not being entirely fictitious, but even then the defendant could enter a conditional appearance and put in an affidavit denying that there was any case within the statute authorizing service out of the jurisdiction. That very point seems to have been decided in 1864 in the case to which our attention has been called, *Foley* v. *Maillardet* (1), by Lord Chancellor *Westbury*. I had, as I said yesterday, been engaged in cases where affidavits have been admitted without objection, but no doubt the practice was not settled until the decision of Lord *Westbury* in *Foley* v. *Maillardet*. That being so, the practice as to the admissibility of affidavits to contest the question as to whether or not the cause of action arose within the jurisdiction was the same both in Courts of Equity and in Courts of Common Law, and consequently it is still the practice. Therefore the affidavit is admissible for this purpose.

I must not be supposed to decide that the affidavit is admissible to contest the merits of the action. It is not the proper time to try the merits of the action. It is the proper time to try whether the action shall be heard in *England* or in some other country. The question of *forum* is the only question that ought to be tried. That being so, there can be no doubt that the affidavits ought to have been admitted on both sides, but not with reference to the merits of the case except as regards the evidence on the question of *forum*.

I think it right to notice two or three of the other points which were argued before us, which are not unimportant. Rule 1 of Order XI. says, "And whenever any act or thing sought to be restrained or removed, or for which damages are sought to be recovered, was or is to be done, or is situate within the jurisdiction." This is an action which formerly would have been

(1) 1 D. J. & S. 389.

described as an action of deceit, and seeks to recover damages for false representation. The allegation is that the false representation was made within the jurisdiction. Then there is rule 1*a*, which applies to any action brought in respect of any contract, and is limited to cases where the Defendant is resident in *Scotland* or *Ireland*. Now it was suggested that the affidavit required by rule 1*a* as to actions in respect of any contract, ought also to be required when the action is not in respect of contract. It appears to me that that is not the true construction of rule 1*a*, and there is no ground whatever for extending it, for rule 1*a* is carefully confined to that portion of rule 1 which relates to contract. Lord Justice *Lush* and myself were members of the body which settled both rule 1 and rule 1*a*, and we know exactly why the latter rule was made. What was intended is expressed in the clearest terms. The complaint which gave rise to rule 1*a* was with respect to actions of contract, and we had no complaint made with respect to actions of tort, which, no doubt, were much more uncommon. The great complaint was that actions for small debts were brought in *London* against persons residing in *Dublin* and in *Edinburgh*, and places of that kind, to their great annoyance.

Another ground of objection to the order was this. It was said that rule 3 required an affidavit to shew whether the Defendant was a British subject or not, and there was no such affidavit made by the Plaintiff. That is quite true; but rule 3 does not say that the order is to be discharged if it is not complied with. That is discretionary in the Court, and always was. Though the affidavit is required, if it turns out that that which is omitted is wholly immaterial there is no obligation on the Court to discharge the order. I took part in the drafting of the rules, and the observation applies to me as much as to anybody else who had to do with them, but the fact is that rule 3 is not as carefully framed as it might have been. The object of the rule was this, that if you have a British subject anywhere you may serve him with a writ; there is no objection to it whether he is residing in a foreign country or whether he is residing in a part of the Queen's dominions, but if he is not a British subject, and you want to serve him out of the Queen's dominions, you must not serve him with a writ, because most foreign countries would object to that.

C. A.
1881
FOWLER
v.
BARSTOW.
Jessel, M.R.

You must serve him with the notice which is provided for by the rules, and the object was that the Court should know whether it should direct service of a writ or service of a notice. If a man is in *Scotland* it is wholly immaterial whether he is a British subject or not, because you can serve anybody in the Queen's dominions with the Queen's writ, and therefore it was not wanted for that purpose, and it becomes wholly immaterial to consider, as everybody within the Queen's dominions owes at least temporary allegiance to her Majesty, whether he is a British subject or not. The rule, no doubt, should have been framed so as to apply only to those cases where the person who is sought to be served resides out of the Queen's dominions. However, that is what is meant, and though it is wide in terms, when you look at the purview of the rule you can see it was not intended to apply to *Scotland*, and I believe, as a rule, when the defendant is in *Scotland* or in *Ireland* that statement is not put in an affidavit, it being wholly immaterial. Certainly no Court would discharge an order properly made because the affidavit did not contain that which it is directed it should contain when the matter so directed is a wholly immaterial one. That, I think, disposes of the second ground.

On the main point as to whether or not there was a cause of action within the jurisdiction, I am in favour of the Appellant. [His Lordship then referred to the statements in the affidavits set forth above, and continued:—] On the first affidavit I agree that if the Plaintiff had not retired from it there would have been a case. But it appears to me plain upon reading all these affidavits that the statement made by the Plaintiff in his first affidavit is now admitted by him to be incorrect, and there is no longer any allegation whatever by anybody that the Defendant *Barstow* made any representation within the jurisdiction.

I think, therefore, the appeal should be allowed, and the order discharged with costs both here and below.

BAGGALLAY, L.J.:—

I desire to state very concisely my reasons for holding that this appeal should be allowed.

The action was brought to recover damages for misrepresenta-

tions alleged to have been made by the Defendant in respect of a subject-matter which need not be more particularly referred to. There was nothing upon the face of the writ to shew any ground whatever for permitting service upon a defendant out of the jurisdiction. In order to obtain permission to do that it was essential that the Plaintiff should comply with the terms of the 3rd rule of Order XI. What he had therefore to do was this, he had to shew by affidavit or otherwise in what place or country the Defendant was or probably might be found, and whether such Defendant was a British subject or not. To this extent, so far as was necessary, he complied with the rule, for I do not consider the omission to state that the Defendant was a British subject was material, as he was within the British dominions; but the rule then goes on—"and the grounds upon which the application is made"—that does not mean the whole subject-matter and the merits of the application, but the grounds upon which the application is made are sufficiently stated upon the affidavit if it shews that the alleged cause of action arose within the jurisdiction. I agree with what was said by Mr. *Crossley* in the early part of his argument, that this is a case within the last paragraph of the 1st rule of the Order. The action is in respect of misrepresentation made within the jurisdiction by a person who is now out of the jurisdiction. As I am at present advised (possibly I might take a different view upon a further argument of it) I think that the original affidavit filed by the Plaintiff was sufficient to obtain leave to serve out of the jurisdiction. It was in form sufficient. Reading it in the way in which documents of this kind ought to be fairly read, there was sufficient. No doubt there was a way of reading it which would have made it insufficient, but according to the ordinary interpretation to be given to the document, there was sufficient to support the original order. Upon that the jurisdiction was based. But then the Defendant puts in an affidavit in which he makes a statement which, if true, shews that there was no jurisdiction whatever to make an order, because, he says, he never made any misrepresentation at all, either by word of mouth or by letter, or in any other way. Now, I quite think that upon an application to discharge such an order as was made in this case, an affidavit may be made for the

C. A. 1881 FOWLER v. BARSTOW. Baggallay, L.J.

purpose of shewing that the Court had no jurisdiction to make an order, but I do not think, as at present advised, it should go beyond that unless there were some case of gross fraud or perjury, or something of that kind. In ordinary circumstances the affidavit ought not to go beyond the mere fact of shewing there is no jurisdiction to make an order. It may well be that in order to make a sufficient affidavit for that purpose it is essential, in some respects, to deal with the merits of the case; as, in the present case, where the Defendant gives the strongest evidence that he made no misrepresentation within the jurisdiction by swearing that he never made any misrepresentation at all at any place, which must cover the case of having made one within the jurisdiction; I do not understand why that evidence was not taken into consideration when the matter was before the learned Judge in the Court below. I do not find that the affidavit is entered in the order that was drawn up, though another affidavit is. Possibly the learned Judge declined to look at the affidavit from a misapprehension that it had been filed for the purpose of shewing there were no merits in the case, and not for the mere purpose of shewing there was no jurisdiction to make the former order. However that may be, he seems to have paid no attention whatever to that affidavit. That affidavit, if credit is to be given to it, distinctly shews that there was no jurisdiction to make the original order. The Plaintiff had a right to file, and has filed, another affidavit explanatory of what had gone before; but it appears to me that the supposed explanation on the part of the Plaintiff establishes the Defendant's case, and in no way removes the obstacle put in the way by what the Defendant has stated. For the purpose of discharging the order there was an affidavit which could properly have been used for the purpose, and it ought to have been used. However, it is used now before us, and the terms of it are unanswered.

Therefore I think the appeal should be allowed.

LUSH, L.J.:—

I am very glad to find that the point we are now deciding has been established in this Division ever since the *Judicature Act* and ever since the *Common Law Procedure Act* in the Common

Law Division. Therefore in both Divisions the practice has been established.

Now the difference between the *Common Law Procedure Act* and the *Judicature Act* is this, that under the *Common Law Procedure Act* a party issued his writ at his peril. If it was against a British subject, wherever residing, the party had power to serve the writ upon him. If it were upon a French subject, for example, in *France,* you were not at liberty to serve a writ upon him, but you had to give him notice of the writ, the reason for which is obvious, namely, that it would be an affront to the Sovereign of that country to assume jurisdiction over his subject in his own country, whereas a British subject might be served with a writ anywhere. The difference of procedure was this. The plaintiff under the *Common Law Procedure Act* issued his writ at his own peril, and when he came to act upon, and to apply to the Court to allow him to proceed on the service of, that writ, then arose the question whether the cause of action accrued within the jurisdiction or not, and although it arose at that different stage it was then open to the defendant to contest the matter upon evidence—upon counter affidavits.

The *Judicature Act* requires leave to be given before the writ is issued at all, which I think is a very great improvement. In each case the practice is the same. The 1st Rule of Order II., says: "Service out of the jurisdiction of a writ of summons, or notice of a writ of summons, may be allowed by the Court or a Judge"—I am reading that part which applies to this case—"whenever any act or thing sought to be restrained or removed, or for which damages are sought to be recovered, was or is to be done, or is situate within the jurisdiction." Therefore what the Court is to ascertain is the fact, Was it done within the jurisdiction or not? It does not say that if the plaintiff swears it was that shall be enough, the Court must ascertain the fact. But in the first instance the order is necessarily *ex parte,* and for this reason, if the person is a party residing abroad, you could not serve a summons upon him, because that might be an affront to the Sovereign of the country, and therefore you must issue the order *ex parte,* leaving it to the defendant to come to apply to set aside that order. That is the meaning of the 3rd rule,

C. A. 1881 FOWLER v. BARSTOW. Lush, L.J.

which says, "Every application for an order for leave to serve such writ or notice on a defendant out of the jurisdiction, shall be supported by evidence, by affidavit, or otherwise, shewing in what place or country such defendant is or probably may be found, and whether such defendant is a British subject or not, and the grounds upon which the application is made." Therefore it must be an *ex parte* order in the first instance. Then the Court is to ascertain the fact, and not to be bound by the affidavit in evidence. The defendant is allowed to shew that no cause of action did accrue within the jurisdiction. That is what the Defendant proposes to do here, and that has been the established practice.

What was the state of things here? The Plaintiff filed an affidavit which to my mind afforded a very good *primâ facie* case. I read it (and I cannot read it otherwise) as an allegation by him that the Defendant was a party to making the representation in *London* which he alleges was a false representation. I do not mean to say that he committed perjury, because that would involve another consideration, and of course there must be the *mens rea*, but supposing there were the *mens rea*—that he had known the contrary, I think that affidavit would be specific enough for an indictment for perjury. The Defendant comes and says that that is utterly untrue. He says, "I never saw the Plaintiff in my life, I never spoke to him in my life, I never corresponded with him in my life, and I never authorized anybody to make a representation that I was a party to the sale of this property." The Plaintiff has to meet that, and he does not deny a single one of those allegations. It therefore stands admitted on the affidavit in reply that the Defendant did not make a representation to the Plaintiff, that he did not make it by letter, and that he did not make it by agency at all.

The Defendant has clearly shewn to my mind that a cause of action, as far as he is concerned, did not occur within the jurisdiction. That is the question we have to decide, and upon that I entertain no doubt. Therefore this appeal must be allowed.

Solicitors: *Snell & Greenip*; *Keeping & Co.*

M. W.

TRUSCOTT *v.* DIAMOND ROCK BORING COMPANY.

C. A. 1881 CHITTY, J. *Nov.* 28. C. A. 1882 *Jan.* 18.

[1878 T. 732.]

Power to lease—Repairing Lease—Tenant to do necessary Repairs.

A settlement of house property gave power to the trustees to demise or agree to demise all or any of the messuages "to any person or persons who shall improve or repair the same, or covenant or agree to improve or repair the same, or shall expend or agree to expend such sum or sums of money in improvements thereof respectively, as shall be thought adequate for the interests therein respectively." The trustees agreed to let a house on the terms of a letter by which the tenant undertook "to do necessary repairs":—

Held, by *Chitty*, J., that the agreement did not satisfy the terms of the power, and that specific performance of it could not be decreed at the suit of the trustees.

Held, by the Court of Appeal, that the agreement imposed upon the tenant the burden of doing all repairs which were requisite during the term, and that it satisfied the requisitions of the power.

Doe v. *Withers* (1) doubted.

BY indenture dated the 18th of May, 1863, *John Truscott* assigned to the Plaintiff and three other persons various leasehold properties upon trust for *John Truscott* for life, and after his death, as to certain parts thereof, upon trusts for the benefit of a daughter of the settlor and her husband and children, and as to other parts thereof upon trusts for the benefit of the Plaintiff, who was a son of the settlor, and his wife and children. The settlement contained the following power of leasing: "It shall and may be lawful to and for the said [trustees] and the survivor of them, and the heirs and assigns of such survivor, by any indenture or indentures to be sealed and delivered by them or him in the presence of and attested by two or more witnesses, to demise or lease, or by any memorandum or agreement in writing under their or his hands or hand only, to undertake or agree to demise or lease, all or any part of the said messuages, dwelling-houses, or tenements, hereditaments, and premises, hereby assigned or assured, or intended so to be, with their appurtenances, to any person or persons who shall improve or repair the same, or covenant or agree to improve or repair the same, or shall expend or agree to expend such sum or

(1) 2 B. & Ad. 896.

C. A. 1882 TRUSCOTT v. DIAMOND ROCK BORING COMPANY.

sums of money in improvements thereof respectively as shall be thought adequate for the interests therein respectively, for such term or number of years as they the said [trustees] shall think best; and that in every such lease or leases there shall be reserved the best and most improved yearly rent or rents to be payable during the continuance of the term and estate to be created thereby, and that there be inserted therein a clause in the nature of a condition of re-entry, on non-payment of the rent or rents thereby to be respectively reserved, and so as the lessee or lessees do execute counterparts thereof respectively, and do thereby covenant for the due payment of the rent or rents thereby to be respectively reserved."

John Truscott died in August, 1863.

In 1875 a negotiation took place between the Plaintiff and the Defendant company for a lease to the company of a messuage forming part of the property held in trust for the Plaintiff and his family, and on the 16th of June, 1875, the secretary of the company wrote to the Plaintiff a letter as follows:—

"Our solicitor has not yet had time to get the draft agreement ready. Please state whether the terms mentioned below are those agreed upon. Be good enough to reply by return of post. In the event of your having any remarks to make you will find me here at 11 o'clock to-morrow. Will you kindly send or bring the keys with you. Rental £130 for seven years, with option on our part to terminate at three years by giving six months' notice, lessor to pay all taxes and rates except water. Rent to commence from quarter day. Lessee to do necessary repairs."

On or about the following day the Plaintiff let the Defendant company into possession, and handed over his title deeds to the solicitors of the company that a lease might be prepared.

In November, 1875, the company asked the Plaintiff to put in a new floor. The Plaintiff objected on the ground that the company were to do repairs; but he subsequently agreed to put in the floor for £12, which he did, and the company in May, 1876, paid the amount.

The company paid rent down to June, 1878, inclusive, but refused to pay any further rent, alleging that their tenancy had

been determined by notice. The Plaintiff, in November, 1878, commenced this action, and by his statement of claim he alleged that the property when the Defendants were let into possession was in good and substantial repair, and that they had not done the necessary repairs, and that the premises were consequently much out of repair. The Plaintiff claimed arrears of rent, damages for non-repair and waste, specific performance of the agreement for a lease, and further or other relief.

The company by their statement of defence alleged that no concluded agreement for a lease had been come to, that they were only tenants from year to year, that they had determined their tenancy in June, 1878, by proper notice, and that the premises when they determined the tenancy were in good repair. They denied any liability for non-repairs or waste, but paid into Court £35 to meet any possible claim in that respect.

On the 9th of December, 1880, judgment was given for £50 damages and for rent to June, 1879. It was declared that the agreement ought to be specifically performed, and an inquiry was directed, whether a good title could be made by the Plaintiff to grant a lease of the premises in accordance with the agreement, and whether a good title could have been made by the Plaintiff at the date of the issue of the writ.

The Chief Clerk adopted the opinion of Mr. *Dart*, to whom the title had been referred, and certified that the Plaintiff could not make a good title. The Plaintiff took out a summons to vary this certificate. The summons was heard before Mr. Justice *Chitty* on the 28th of November, 1881.

T. L. Wilkinson, for the Plaintiff, contended that the agreement "to do necessary repairs" meant, in substance, to improve and repair. Supposing, for instance, the building required a new roof, that would come under the head of "necessary repairs," and yet it would also be an "improvement."

Ince, Q.C., and *Jeune*, for the defendant company, contended that the agreement was not within the powers of the settlement, which expressly required "improvement" in addition to "repairing": *Doe* v. *Withers* (1).

(1) 2 B. & Ad. 896.

C. A.

1882

TRUSCOTT v. DIAMOND ROCK BORING COMPANY.

CHITTY, J.:—

This question turns upon the construction of a power and of an agreement purporting to have been entered into under it. Under the agreement the lessees are only to do "necessary repairs." They are not to lay out any money, but, having regard to the state of the property at the time when the Defendants were let into possession—the property then being, according to the Plaintiff's own admission in his statement of claim, in good and substantial repair—they are only to do "necessary repairs." It appears that the Plaintiff claimed damages on the ground that the Defendants had not done all the necessary repairs to the premises, and that they were in consequence much out of repair; and also on the ground that they had committed divers acts of waste and damage. The result was that by the judgment £50 was ordered to be paid in respect of damages.

I now come to the power itself, and it seems that on the true construction of it there is an obligation imposed on the intended lessee, either, before he enters, to improve or repair the property, or to enter into a covenant to improve or repair the same. But according to the agreement the lease is not to contain even a general covenant to repair, but only a limited covenant to do the "necessary" repairs. I think that what was in the contemplation of the settlor or those by whom this power was framed, was that there should be a money expenditure which could be called fairly an improvement or reparation of the premises at the time when the agreement for a lease was entered into. But whether that is so or not, I hold that this agreement to do repairs to a limited extent, that is, to do only "necessary repairs," is not a good equitable execution of the powers contained in the settlement.

I therefore dismiss the summons, with costs.

G. I. F. C.

C. A.

The Plaintiff appealed from this decision. The appeal was heard on the 18th of January, 1882.

T. L. Wilkinson, for the Plaintiff:—

There are two classes of persons to whom leases may be granted —those who improve or agree to improve, and those who repair

or agree to repair. The construction which has been put upon the covenant strikes out the latter branch, and makes it impossible to let the property at all unless it is in such a state of dilapidation as to require what comes under the head of improvement.

[JESSEL, M.R.:—Was *Easton* v. *Pratt* (1) referred to below.]

It was not.

Ince, Q.C., and *Jeune, contrà*:—

We submit that Mr. Justice *Chitty* rightly held that the lease contemplated by the power was one under which something was to be done at or after the granting of the lease which would make the property better. *Doe* v. *Withers* (2) supports this view.

[JESSEL, M.R.:—The observations of Lord *St. Leonards* on that case (*Sugden* on Powers (3)) are very important.]

Easton v. *Pratt* appears to have turned mainly on the fact that though the house was in tenantable repair when the lessee took possession, it was so old that it was likely to become ruinous and require rebuilding. The agreement here provides for nothing but such repairs as an ordinary lease at a rack-rent in *London* would provide for. The power must have meant something more, and should be construed as meaning that the property, if out of repair when let, is to be put into repair, and if in good repair when let, is to be improved.

JESSEL, M.R.:—

The decision under appeal turns upon the question whether under the power in the settlement of 1863 a lease could be granted in conformity with a short agreement not very technically worded, and which requires to be construed as well as the power.

The first question is, what is the meaning of the power? It is a badly drawn power, full of unnecessary verbiage, and, as often happens in instruments to which that remark applies, it is deficient in the material part, so that every one who has dealt with the case has found it difficult to say what it means. [His Lordship

(1) 33 L. J. (Ex.) 233; 12 W. R. 805. (2) 2 B. & Ad. 896.
(3) 8th Ed. p. 830.

C. A. 1882 TRUSCOTT v. DIAMOND ROCK BORING COMPANY. Jessel, M.R.

read the power, commenting as he went along upon the numerous superfluous expressions contained in it, and proceeded :—]

The question on the present occasion is whether the condition that the tenant shall improve or repair the same, or covenant or agree to improve or repair the same, is satisfied by an agreement for a lease by which the tenant agrees to do "necessary repairs." The word "necessary" is not material, for it only expresses that repairs are required. If repairs are wanted at all they are necessary, and if they are not wanted a tenant under an agreement to repair would not be bound to do anything; the agreement, therefore, is in substance simply an agreement that the tenant shall repair. The case is, therefore, within the words of the power. Is it within the substance? I am of opinion that it is. It imposes on the tenant the burden of doing all repairs which are required; and that includes all the repairs which but for the agreement the landlord would be obliged to do. I think this is what the power intended. It has been urged that it was the intention of the power that the lessee should put the property in repair at the commencement of his tenancy. That is satisfied by an agreement to do repairs, for such an agreement means that the tenant shall do all repairs which are requisite during the continuance of his tenancy, and includes putting the property in repair. The agreement, therefore, satisfies the requisitions of the power in substance as well as in form.

Two cases have been referred to in argument. One is *Doe* v. *Withers* (1), as to which I need not say whether all the *dicta* contained in it are good law. I am not satisfied that it ought to be followed, but it does not govern the present case, and it is, therefore, unnecessary to say whether it ought to be overruled. That will be open to the consideration of the Court of Appeal, if ever it becomes necessary to decide it. The other case, *Easton* v. *Pratt* (2), substantially governs the present case. The power there was not in the same terms as here, but the case was stronger against the validity of the lease, for the instrument authorized the granting leases at a rack-rent for terms not exceeding twenty-one years, and building or repairing leases for the term of sixty-one years. Here there is only one power, and if the purchaser's

(1) 2 B. & Ad. 896. (2) 33 L. J. (Ex.) 233; 12 W. R. 805.

construction of it is correct it would be impossible ever to grant a lease of the property at all unless it was first allowed to get out of repair. In *Easton* v. *Pratt* (1), it was decided by Chief Baron *Pollock* and Barons *Channell*, *Pigott*, and *Bramwell*, that the lease was not authorized by the power as it was not a repairing lease. All of them agreed in that. Baron *Bramwell* said (2), "I should say as a matter of reasoning, independently of any of the authorities, that the expression 'repairing lease' requires a lease with more than the common covenant, which does not call upon the lessee to make good the defects which time brings about in the substantial fabric of the building. The authority of Lord *St. Leonards* in his treatise cited is decisive upon that point." On appeal the question was fully discussed, and the Court of Exchequer Chamber reversed the decision (3), and held that a covenant that the lessee would during the term, when and as often as necessity should require, repair the premises, satisfied the terms of the power, which required that the lease should be a repairing lease. Chief Justice *Erle* said (4), "The question has been raised whether the lease which has been made was a repairing lease within the meaning of the power contained in the will of the testator enabling certain persons to grant a repairing lease for sixty-one years or less." Then, "the parties to the lease clearly intended it to be a lease within the power." If anything turns on that such was also the case here. "The expression 'repairing lease' has no very precise signification. I do not think that it has a defined meaning as a name of art, with the Court of Chancery or among conveyancers. There is here nothing, in my opinion, that enables us to say that this is not a repairing lease within the meaning of the will. I am at a loss to know what could be added to this covenant to make it more comply with the requirement that it should be a repairing lease. I am clearly of opinion that whatever was the state of the premises at the time of the demise the tenant would be bound under this covenant to put the premises into and keep the premises in a state of good and sufficient repair." This is a decision

(1) 33 L. J. (Ex.) 31; 12 W. R. 157.

(2) 33 L. J. (Ex.) 33.

(3) 33 L. J. (Ex.) 233; 12 W. R. 805.

(4) 33 L J. (Ex.) 234.

C. A. 1882 TRUSCOTT v. DIAMOND ROCK BORING COMPANY.

that the insertion of a covenant by a tenant to repair and keep in repair the premises makes a lease a repairing lease. That is a stronger case than the present, where the power does not use the expression "repairing lease," but only requires the insertion of a covenant to repair. I am of opinion, therefore, that the appeal must be allowed.

BRETT L.J.:—

I agree with the observation of the Master of the Rolls as to the needless accumulation of immaterial words in this power. In endeavouring to extract its meaning we must construe it according to ordinary rules—that is according to the ordinary use of the English language—unless technical terms are used, in which case those terms must be taken in their technical sense. Here the words are not in any known technical form. We must, therefore, interpret them according to the ordinary use of the English language, giving as far as possible a meaning to every term. I cannot agree that "improve" and "repair" are equivalent terms, and that the power when it speaks both of repairing and improving, means that the lessee would in every case be bound to improve the property. Taking the words in their natural sense, they mean that the landlord is to be freed from doing the repairs which a landlord usually would have to do. Usually a landlord gives the premises to the tenant in good repair, and if there are no special stipulations the tenant is bound to do some repairs, the others must be done by the landlord if done at all. Here the trustees could only grant leases under which the tenant is bound to do the repairs which usually would fall on the landlord. The lease must contain a covenant by the tenant to keep the property in repair throughout the term, by doing what the landlord would otherwise have to do. If that is what the power means, do the terms of this agreement satisfy it? Would a lease to be drawn up according to the terms of this agreement contain such a covenant as the power requires? The lessee is to do "necessary repairs." Mr. Justice *Chitty* seems to have thought that this only applied to a very limited class of repairs, but I think it must mean all such repairs as would be necessary to enable the landlord to hand over the property to a new tenant in substantial and tenantable

repair. Therefore, though differing with some hesitation from Mr. Justice *Chitty* and Mr. *Dart*, I think that the terms of the agreement satisfy the requirements of the power.

As regards the cases cited, I decline to express any opinion as to *Doe* v. *Withers* (1). The words there were very different from those in the present case, and supposing it to be well decided, it does not conflict with the conclusion to which we have come, while *Easton* v. *Pratt* (2) is strongly in favour of that conclusion.

HOLKER, L.J.:—

I am of the same opinion. We have to ascertain the meaning of the terms used in the power and in the agreement. The terms of the agreement are "lessee to do necessary repairs," and this it seems to me must mean that he is to do all repairs. If we look at the terms of the power, I think it must be understood to mean that a lease should not be granted except to a person who agreed either to improve the property or to repair it. Improvement here is out of the question, and the reasonable construction of the power as regards repairs is, I think, that the lessee must covenant to do repairs generally, that is all such repairs as are needful. By the present agreement he does undertake to do them, and I think that the terms of the power are satisfied.

Solicitor for Plaintiff: *G. R. Pilgrim.*
Solicitors for Defendants: *Norton, Rose, Norton, & Brewer.*

(1) 2 B. & Ad. 896. (2) 33 L. J. (Fx.) 233; 12 W. R. 805.

H. C. J.

C. A.
1881
V.-C. H.
Dec. 12.
C. A.
1882
Jan. 25.

GENERAL SHARE AND TRUST COMPANY *v.* WETLEY BRICK AND POTTERY COMPANY.

[1881 G. 483.]

Winding-up—Distress by Landlord of Company—Clause of Re-entry.

Mines were demised to a company by a lease which contained a power of re-entry if the rents or royalties, or any part thereof, should be in arrear for thirty days, or if the company "should be wound up voluntarily or by compulsion or otherwise under the provisions of any Act or Acts of Parliament." An action was brought against the company by debenture holders, and a receiver was appointed. Rent being in arrear, the landlord took out a summons for leave to distrain or re-enter. After the summons had been returnable, but before it was heard, an order was made for winding up the company. The summons was then amended by intituling it in the winding-up as well as in the action :—

Held, by *Hall*, V.C., that as the landlord was a creditor of the company, leave could not be given him to distrain, and that the claim to re-enter ought to be left to be tried in an action.

Held, by the Court of Appeal, that according to the true construction of the proviso for re-entry, a right to re-enter accrued on the making of a winding-up order, and that, the title of the landlord to re-enter being clear, the Court ought to order possession to be given to him, and ought not to put him to the useless expense of bringing an action to which there was no defence.

By indenture dated the 30th of January, 1878, Sir *George Chetwynd* demised to the Defendant company certain mines of coal, cannel, ironstone, marl, and clay, for a term of twenty-one years from the 25th of March, 1877, at a minimum rent of £230. The lease contained a proviso for re-entry if the rents, royalties, &c. . . . or any part thereof should be unpaid for thirty days after any of the days on which they became due, or if the lessees should assign or set over the demised premises, or any part thereof, "or if the lessees, their successors or assigns, shall be wound up voluntarily or by compulsion or otherwise under the provisions of any Act or Acts of Parliament," or should become bankrupt . . . or if any of the covenants or agreements on the part of lessees, their successors or licensed assigns, should not be by them or him observed and performed.

On the 26th of February, 1881, the Plaintiffs commenced this

action on behalf of themselves and all other the holders of mortgage debentures of the Defendant company to enforce their securities, and on the 3rd of March, 1881, an order was made in the action appointing *Bishop* receiver and manager.

In October, 1881, Sir *G. Chetwynd*, the rent being considerably in arrear, put in a distress. *Bishop* thereupon gave notice of motion that he might be committed for contempt, and ordered to withdraw from possession. Sir *G. Chetwynd* thereupon withdrew his distress and paid the costs.

On the 29th of September, 1881, the balance due to Sir *G. Chetwynd* in respect of the minimum rent was £490, and on the 5th of October he took out a summons in the action asking that *Bishop*, the receiver and manager, might be ordered to pay him the £490, or that the applicant might be at liberty to distrain, and that the costs of the application might be paid by the receiver and manager, "and in default of payment of the said rent and costs as aforesaid, or in default of sufficient distress being found on the premises, that the applicant may be at liberty to enter upon the said premises and determine the lease thereof," the last clause having been introduced by amendment.

On the 12th of October, 1881, after the summons had become returnable, a petition was presented for the compulsory winding-up of the company, and on the 4th of November, a winding-up order was made. The summons was then amended by intituling it in the Companies Acts, and in the matter of the winding-up as well as in the action. The summons was heard before Vice-Chancellor *Hall* on the 12th of December, 1881.

Cozens-Hardy, for the lessor:—

The summons in effect asks that the receiver should be ordered to pay the rent which was in arrear before the petition was presented for a winding-up of the company, or that the lessor (Sir *George Chetwynd*) should have liberty to distrain for the amount due. This is a case in which, looking at all the circumstances, the Court will, it is submitted, act rightly in exercising the discretion it possesses, notwithstanding the provisions of the 163rd section of the *Companies Act*, 1862; and in allowing the lessor to proceed with his distress. It is contrary to the course of

C. A. 1882 — GENERAL SHARE AND TRUST COMPANY v. WETLEY BRICK AND POTTERY COMPANY.

practice to allow a receiver to be and remain in possession, and not to pay and discharge all obligations. If it had not been for the operation of the winding-up order the landlord would probably have obtained all that he was entitled to. It should not be forgotten that the summons was returnable before the petition for winding-up was presented. The case is within the authorities of *In re Regent United Service Stores* (1), *Thomas* v. *Patent Lionite Company* (2), *In re Bastow & Co.* (3), *In re Exhall Mining Company* (4), and *In re Hill Pottery Company* (5); but apart from all authority this is a case in which the Court should, as the landlord submits, allow the distress to proceed; it was only prevented by the receiver being in actual possession. Though a liquidator has been appointed, there has been no order for removing the receiver, and he is not out of possession yet. An order is asked for according to the terms of the first part of the summons, *i.e.*, for liberty to distrain, notwithstanding the terms of the lease, except the receiver pays the rent and the costs of this application. If there should not be enough to satisfy the demand, or if the lessor should not have liberty to distrain, then he will claim his right to re-enter.

W. Pearson, Q.C., for the liquidator:—

No rent has become due since the order for winding up the company. The company is not wound up, but only ordered to be so. The landlord is a creditor, and the Court will not, it is submitted, allow him to re-enter. If he brought an action he would not be allowed to re-enter if the rent were paid. There is no case made out upon this summons on which the Court will exercise its discretion, and allow re-entry.

Whether the landlord should be allowed to bring an action is a very different question. As to giving liberty to proceed with the distress, the liquidator contends that the landlord is a creditor for the rent claimed, the whole of which became due prior to the order for winding-up; and that he has a right to prove for it in the liquidation. It has been settled by the highest authorities that

(1) 8 Ch. D. 616.
(2) 17 Ch. D. 250.
(3) Law Rep. 4 Eq. 681.
(4) 4 N. R. 127.
(5) Law Rep. 1 Eq. 649.

a landlord shall not be allowed to distrain in respect of rent which has become due before the winding-up order: *In re North Yorkshire Iron Company* (1); *In re Bridgewater Engineering Company* (2). The remedy in the landlord's hands is to prove in the liquidation, and he will not be entitled to be paid more than he would receive under a bankruptcy: *Judicature Act*, 1875, s. 10.

The cases which have been cited have no application here. They are quite distinguishable. The decision in *Thomas* v. *Patent Lionite Company* (3) is in the liquidator's favour, and it is on all fours with this case. It is submitted that the summons, so far as it asks for liberty to distrain, should be refused.

[He also referred to *In re Brown, Bayley, & Dixon* (4)].

E. S. Ford, for the receiver:—

There are no funds in the receiver's hands, and the order for winding up put a stop to his acting altogether: Sect. 87 of the *Companies Act*, 1862. I ask for the costs of bringing the summons into Court.

Cozens-Hardy, in reply.

HALL, V.C.:—

This case is one within the rule in reference to an application under the 163rd section of the *Companies Act*, 1862, unless it be taken out of the operation of the section by reason of there having been an order made for the appointment of a receiver, or by reason of there being a mortgage made by an assignment of property which it is said would have the effect of making the property now sought to be made available, or that part of it which would otherwise be within the operation of the 163rd section, not the estate of the company. Now, as regards the mortgage, it does not appear to me that because particular chattels are the subject of a mortgage, it has the effect of making them not the estate of the company within the meaning of the section. The assignment by way of security of a particular debt, as in this case, does not render the property comprised in the security not the estate of

(1) 7 Ch. D. 661.
(2) 12 Ch. D. 181.
(3) 17 Ch. D. 250.
(4) 18 Ch. D. 649.

C. A. 1882 — GENERAL SHARE AND TRUST COMPANY v. WETLEY BRICK AND POTTERY COMPANY. — V.-C. H.

the company. On the ordinary understanding of the words, the property is the estate and effects of the company notwithstanding the security, and subject only to the security. Therefore it is within the words of the section. No authority has been referred to to shew that the case is not within the ordinary meaning of the words. Something was said about there being more than one lot of chattels upon the premises, *i.e.*, the chattels which were upon the premises when the assignment was made, and the chattels brought upon the premises by the receiver. But I do not know that, for the purposes of carrying on the concern, it was necessary to bring upon the premises any other chattels during the time when there was a receiver, and the statement is in fact denied.

There is another class of chattels mentioned which it was said were brought upon the premises between the date of the deed and the month of March, but these are only a portion of the class which I have just spoken of. All such chattels still remain, I conceive, the property of the company, and are clearly within the words of the section.

It was said that from the position in which the property was, it was for good reasons capable of being resorted to, and that it should be allowed to be resorted to notwithstanding the 163rd section. It does not appear to me, however, that any authority has been cited in support of that proposition. There are no peculiarities in this case which prevent these chattels being subject to the ordinary rule. This is not a case like that of sub-lessees, or of a company not being themselves the lessees of the property, or of somebody else being the trustee, and liable for the rent, and the claimant not having a right to resort to the company, as being a creditor of the company. Here the claimant is a creditor of the company, and is within the ordinary rule as such creditor; and I see no reason why he should be treated and dealt with upon any special grounds. I am unable to find any special ground for allowing the applicant to distrain for any rent which has accrued due since the time when the winding-up order was made, or to the present time. But no rent will be due until March, therefore there can be no claim on that account.

The only remaining suggestion is that this is a case where the applicant ought to be allowed to re-enter. That was not within

the scope of the summons as it was originally framed; but I am told this morning that leave was given to amend; and the summons now is in the alternative, viz., that upon non-payment of rent the applicant may be allowed to distrain; and in default of payment of the rent, or in default of sufficient distress, he may be allowed to re-enter. The two grounds for re-entry manifestly have reference to the power to do so for non-payment of rent. As to that question, if it depended upon that, the applicant would be left unquestionably to pursue the remedy which he may have, leaving open the ordinary defences to the tenant or lessee in such cases; that is, it would not be a matter of course to recover possession for non-payment of rent. There would be the ordinary case for the Court refusing relief for non-payment of rent on the ground of payment of rent, or otherwise. At all events I should not in such a case interfere by at once giving power to re-enter. All that I should do in such a case would be to let the applicant bring an action, and allow the lessee to resort to such a defence, if any, as might be open to him. In like manner, if the summons should be amended by extending it and making it embrace any particular breach of covenant, or if it should be amended to make it apply to any specific case mentioned in the power of re-entry, then that also should be left open to be dealt with in an action, and not upon a summary application of this kind. Therefore, treating the summons as so amended, that is the conclusion I have come to.

The application was accordingly refused with costs.

T. F. M.

C. A.

Sir *G. Chetwynd* appealed. The appeal was heard on the 25th of January, 1882.

Cozens-Hardy, Q.C., and *Chadwyck Healey*, for the Appellant:—

A winding-up order having been made, and the Appellant being a creditor, we do not urge that liberty can be given him to distrain, but we contend that the right to re-enter is clear, and that where the property is in the hands of the Court, a landlord will

C. A. 1882

GENERAL SHARE AND TRUST COMPANY v. WETLEY BRICK AND POTTERY COMPANY.

not be put to the useless expense of bringing an action to which there is manifestly no defence.

W. Pearson, Q.C., for the liquidator :—

As to the rent due in September, the Appellant is a creditor of the company and can prove, he has therefore no right of distress for that. As to the rent to become due in March, we shall be ready to pay it. The company has not been wound up, and no right of re-entry has accrued under the proviso as to winding-up. By sect. 163 the landlord, if he recovered in ejectment, could not issue execution except by leave of the Court under sect. 87.

[JESSEL, M.R. :—Which leave the Court will give as a matter of course, unless some ground is shewn why it ought not to be given.]

E. S. Ford, for the receiver.

JESSEL, M.R. :—

This is an appeal from a decision of Vice-Chancellor *Hall*. Sir *George Chetwynd* is the owner of a mine of which the company are the lessees. The company having fallen into difficulties, an action was brought by their debenture-holders to realize the debenture securities, in which action a receiver was appointed, and notice of the appointment given to Sir *George Chetwynd's* agent. There being two years' rent in arrear, Sir *G. Chetwynd's* advisers, forgetting, no doubt, the effect of the appointment of a receiver, put in a distress, and were served with a notice of motion to commit for contempt. Finding that they had made a mistake, they paid the costs of the motion and withdrew from possession. Sir *G. Chetwynd* then applied for leave to distrain or to re-enter. The lease contained a proviso for re-entry if any rent should be in arrear for thirty days; or if the company should be wound up. At the time when the summons came on to be heard an order for winding up the company had been made, and the summons had been amended by intituling it in the winding-up as well as in the action. It was objected that the applicant could not distrain, because of the winding-up order, and it was urged, I do not know

why, that he had no right to re-enter. Under the terms of the proviso he was clearly entitled to re-enter, and could only be kept out of possession by the unlawful act of the tenant. The Vice-Chancellor thought that he ought not to be allowed to re-enter without establishing his right by an action. I see no reason for putting him to an action. I have often said both here and at the Rolls, that when in a winding-up a landlord comes to the Court asking for the possession of property which is under the control of the Court, and the claim is one against which the liquidator would have no defence, the right course is to order the liquidator to give up possession. It would be a cruel hardship to put the applicant to the expense of bringing an action when the Court can see that there is nothing to be tried. He might lose his costs, as he might be proceeding against the liquidator of a company with no assets. No question arises here as to the construction of the proviso for re-entry so far as regards non-payment of rent. As to the power of re-entry if the company is "wound up," that is an ambiguous phrase, which might relate to the making an order to wind up, or to the company being finally wound up, but when we consider the nature of the case, there is no doubt which is the correct interpretation. The clause must refer to the making an order for winding-up, for, on the other construction, a final winding-up could never be made, since the property could not be sold while the landlord's right of re-entry subsisted. An order must be made for the liquidator to give up possession, and the Appellant must have his costs of the appeal out of the estate, but no costs below will be given, for the liquidator could not give up possession without an order.

As to the costs of the receiver, it was irregular to make him a party. He ought not to have been served unless a case of personal misconduct was made against him, and no such case is alleged. It is true he applied against the landlord for an order to commit, and this application against him is a sort of retort courteous, but that does not justify it. The Appellant must pay the receiver's costs below and here.

BRETT, L.J.:—

The landlord claims a right to re-enter on two grounds, non-pay-

C. A. 1882 — GENERAL SHARE AND TRUST COMPANY v. WETLEY BRICK AND POTTERY COMPANY.

ment of rent, and the fact that a winding-up order has been made. I think that according to the true construction of the proviso for re-entry, the right to re-enter arises as soon as the order is made, and is not suspended until the winding-up is completed. It is urged that the case is within the *Companies Act*, 1862, s. 163, and that the Court has a discretion whether it will allow the landlord to re-enter; but I am of opinion that the case is not within that section. The application is for an order justifying the liquidator in doing what under the terms of the lease he ought to do, and I think it a matter of course that it should be granted, there being no reason shewn to the contrary.

HOLKER, L.J.:—

I am of the same opinion.

The landlord not being desirous of enforcing the forfeiture, provided his rent was paid, an order was made by arrangement that possession should be given to him within a month; the order not to be enforced if within that time the liquidator paid the arrears of rent and the costs both below and in the Court of Appeal.

Solicitor for Appellant: *Worthington Evans.*
Solicitor for Respondents: *T. C. Russel.*

H. C. J.

In re TALBOT (AN ALLEGED LUNATIC).

C. A.
1882
Jan. 28.

Irish Inquisition—Transcript of Record—Jurisdiction of English Court over Proceedings in Ireland—Lunacy Regulation Act, 1853 (16 & 17 *Vict. c.* 70), *ss.* 41, 52 [*Revised Ed. Statutes, vol. xi. pp.* 671, 673].

Where an order in lunacy has been made in *Ireland* by the Court having jurisdiction for that purpose, and a transcript of the record has, under the provisions of sect. 52 of the *Lunacy Regulation Act*, 1853, been transmitted to this country, the English Court must treat the order as a binding order, and has no jurisdiction to entertain an application either for the purpose of setting aside the proceedings in *Ireland*, or for a *supersedeas*. Any such application must be made to the Court which originally made the order.

The right of an alleged lunatic to demand a jury is confined to the original inquiry.

IN May, 1880, a petition was presented to the Lord Chancellor of *Ireland* by *E. L. K. Talbot*, alleging that his mother, *A. C. Talbot*, was of unsound mind, and incapable of managing her own affairs, and praying for an inquiry into the state of her mind.

The alleged lunatic was a lady residing in *England* having property in *Ireland*, and at the time of the petition was lodging temporarily in *Dublin*.

Upon the petition an affidavit of the lady's physician was read, stating that in his opinion any notice to her of the presentation of the petition or service of the petition upon her, would be extremely prejudicial to her health and prospects.

On the 20th of June, 1880, an order for the inquiry prayed was made, and on the 26th of June, 1880, an order was made directing substituted service of the notice of the petition and order for inquiry by serving the same on her daughter, and by the same order the Lord Chancellor declared *A. C. Talbot* to be of unsound mind and incapable of managing her person or property.

This order was prefaced by a recital, "It appearing that the said *A. C. Talbot* has not demanded an inquiry before a jury."

The daughter of the alleged lunatic was appointed the committee of her person, and her son, *E. L. K. Talbot*, the committee of her estate in *Ireland*.

On the 18th of August, 1880, the Lord Chancellor of *Ireland*

C. A. 1882 ~~ *In re* TALBOT (AN ALLEGED LUNATIC).

made an order directing (*inter alia*) the alleged lunatic to continue to reside at her house in *London* under the care of the committee of the person, and directing *E. L. K. Talbot* to apply to the Lord Chancellor of *Great Britain* to have the transcript of the declaration of lunacy entered as of record in the High Court of Justice in *England*, and also to pray the appointment of the lunatic's daughter as committee of the person in *England*, and further to pray the Lord Chancellor of *Great Britain* to make such committee of the person an allowance for her personal expenses out of the fortune of the lunatic in *England*.

The order of the 26th of June, 1880, was exemplified on the 7th of December, and the transcript entered as of record in *England* on the 13th of December, 1880.

The alleged lunatic had no notice of any of the proceedings in *Ireland*, no copy or notice of the petition was ever served upon her, nor was she present or represented by solicitor or counsel at any of the proceedings which ensued in the matter after the presentation of the petition.

On the 3rd of June, 1881, she heard for the first time of the appointment of committees of her person and estate, and on the 8th of June, 1881, she first heard that proceedings were being taken in the English Court for the purpose of giving effect to the Irish proceedings.

She thereupon presented a petition to the Lord Chancellor of *England* alleging the before-mentioned facts with regard to the Irish proceedings, and stating that she resided in *England*, was of sound mind and capable of managing her affairs, and was embarrassed by the proceedings being prosecuted in the English Court, and praying leave to attend before the Lord Chancellor for the purpose of being examined as to her sanity of mind, &c., and praying a *supersedeas* of the inquisition and proceedings thereon forthwith, and transmission of a transcript of the record of the writ of *supersedeas* to the Court of Lunacy in *Ireland*, to be entered as of record there, or that the inquisition so entered of record in this Court as against her be not further acted upon.

The evidence as to the lady's state of mind was conflicting.

The petition came on on the 30th of July, 1881, when Lord Justice *Cotton* expressed an opinion that he had no jurisdiction to

grant a *supersedeas*, and that if the regularity of any of the proceedings in *Ireland* were questioned application should be made to the Lord Chancellor of *Ireland*, and accordingly ordered the petition to stand over in order to enable the petitioner to take proceedings in *Ireland* if she thought fit.

No application was made to the Irish Court, but the petition was amended by adding a prayer for an inquiry before a jury as to her state of mind, &c., and by praying *supersedeas* of the proceedings in *England*, and for transmission of a transcript of the writ of *supersedeas* to the Court of Lunacy in *Ireland* to be entered as of record there, or that the said transcript transmitted from *Ireland* and so entered as of record in that Court be not further acted upon.

The petition as amended came on for hearing on the 28th of January.

Benjamin, Q.C., and *Rigby*, Q.C. (*Yate Lee* with them), for the Petitioner:—

The petition asks for two things: a *supersedeas*, and that no further proceedings may be taken in this country upon the order made in *Ireland*.

It may be that any application for a *supersedeas* will have to be made in *Ireland*, but the other part of the petition, that the existing inquisition in *Ireland* should not be further acted upon, is an appeal to the discretion of the Court. Under the *Lunacy Regulation Act*, sect. 52, when the transcript of the record is transmitted from *Ireland* to *England*, or *vice versâ*, the Lord Chancellor has a discretion as to whether he will or will not act upon it. He is not bound to act upon it. The words "if and so long as the Chancellor shall see fit," will otherwise have no meaning. The Court must look at the record of the inquisition, and though the record itself stands, yet the Court will act or not act upon it, according as in the exercise of its discretion it thinks proper. Some ground must no doubt be shewn to justify the Court in refusing to act upon it, but the whole proceedings in *Ireland* were so irregular, and the inquisition going on the substituted service upon the daughter, the Petitioner lost that which she had a right to, viz., a jury.

C. A.
1882
In re TALBOT (AN ALLEGED LUNATIC.)

The Petitioner desires now, assuming the proceedings in *Ireland* to be right, to have the question of her sanity decided by a jury, sect. 41; but if she proceeds in *Ireland* for a *supersedeas* she will not have a right to one, and she will be shut out of her right if she is sent back to *Ireland*.

[JESSEL, M.R.:—The only right to a jury is on the original inquiry. There is no right afterwards unless the lunatic traverse, but the time for that has expired.]

If the *supersedeas* can only be granted in *Ireland*, she must go personally to *Ireland* to obtain it, for she must go before the Lord Chancellor: *Pope* on Lunacy (1); citing *In re Dyce Sombre* (2); *In re Gordon* (3).

The lady is at all events no longer a lunatic and applies to the protection of this Court by asking for a jury to decide the question, that request cannot be refused on the mere ground of procedure. If this were the original inquiry her right to a jury could not be gainsaid, is there anything to prevent the Court in the exercise of its discretion allowing her to have the question now decided by a jury?

[JESSEL, M.R.:—The Court has no power to order a jury now.]

Davey, Q.C., and *Maclean*, *Fooks*, Q.C., and *Bagshawe*, for the Respondents, were not called upon.

JESSEL, M.R.:—

As I understand the 52nd section of the *Lunacy Regulation Act* the meaning of it was this, that the English Court might act upon the decision of the Irish or Scotch Court without further inquiry, and so also the Irish or Scotch Court might act upon the decision of the English Court without further inquiry. I use the term "Court," although it hardly applies perhaps as a proper description of the persons who exercise the English or Irish jurisdiction. That being so, upon what principle does the Court act in following out a judgment of the Irish or Scotch Court. As a general rule it simply gives credit to the propriety of the decision arrived

(1) Page 191. (2) 1 Ph. 136.
(3) 2 Ph. 242.

at in *Ireland* or *Scotland* and does exactly the same thing. There may be some extraordinary case of fraud or accident, which has never yet occurred to my knowledge but which may possibly occur, in which the Court may consider it not fit to act upon such a decision, at all events until an opportunity has been given to reverse it or set it right.

In the present instance the Lord Chancellor of *Ireland* in exercise of the same jurisdiction as that which belongs to this Court (for although it happens to be in another part of the *United Kingdom* it is not a foreign country, he acts under the sign manual of the Queen in the same way as this Court, and I believe in substance the procedure in *Ireland* is the same as the procedure in *England*), acting under the same delegated power—the power delegated by the Queen under her sign manual—and in a similar procedure, has found the Petitioner a lunatic and has transmitted the record here. Our acting on that record would in an ordinary case be a matter of course. Then it is alleged that there has been a miscarriage in the proceedings in *Ireland*, that the Petitioner had no notice of the proceedings, that she was prevented having notice of the proceedings by a deception practised upon the Lord Chancellor in *Ireland* by her physician stating that notice of the proceedings would be so injurious to her that it was not desirable she should have notice; thereupon the notice was dispensed with and she was found a lunatic on insufficient and unsatisfactory evidence. That is the allegation. If that has occurred, and I must not be assumed to be assenting to the correctness of these representations, but if that were correct there is a remedy—application may be made in *Ireland* to set aside the proceedings, and there is as good justice to be obtained from the Lord Chancellor in *Ireland* as there is from us. There is no reason in the world why we should assume to act without that attempt being made in *Ireland*. Now assuming that the applicant fails altogether upon that ground, but that she is now of sound mind which she alleges herself to be, then there is another course open to her, she can apply in *Ireland* for a *supersedeas*, and if the Lord Chancellor of *Ireland* is satisfied that she is now of sound mind he will issue his writ of *supersedeas* and it will be transmitted over here and will stop all further proceedings. I see no reason why she should not

C. A. 1882 *In re* TALBOT (AN ALLEGED LUNATIC). Jessel, M.R.

apply in *Ireland* again, which is the proper *forum*. This lady was in *Ireland* at the time when these proceedings were commenced, and to my mind it would be something shocking to contemplate that different decisions could be come to on such a question as this in *Ireland* and in *England*. I should presume that the same decision would be arrived at. There is no reason therefore why we should attempt to interfere with the Irish jurisdiction any more than I should expect, if the English jurisdiction had found a person a lunatic who happened to be resident and have property in *Ireland*, that the Irish Court would attempt to interfere with the exercise of our jurisdiction. Just see what would happen if this Court decided not to act further on the inquisition—she would remain lunatic in *Ireland*, she would still be a lunatic without a *supersedeas*, and her property in *Ireland*, whatever it might be, would be subject to the Irish jurisdiction. We should not finish the matter; they might still go to *Ireland* and proceed with the lunacy there, and ours would be a mere partial and imperfect interference. It seems to me that it is clear the application should be made in *Ireland*, and, as I understand it, that was the view taken by Lord Justice *Cotton*. He decided that if it was intended to make an application either to set aside the proceedings or for a *supersedeas*, it must be made in *Ireland*, and if that application were to succeed—I do not venture to say whether it will or will not succeed—then it would be right to come back here and stay proceedings, and therefore he gave an opportunity for making such an application by allowing the petition to stand over. I am quite willing to do the same thing if there is any intention to apply to the Court in *Ireland*, but then I think the time should be limited, and if an application is not made within that limited time the petition should be restored to the paper to be disposed of.

BRETT, L.J.:—

It seems to me quite clear that this Court could not set aside the Irish inquisition on the ground of irregularity. Neither could this Court supersede the inquisition so far as *Ireland* is concerned. The only question is whether this Court now ought to decline to act on the transcript which is recorded here having been sent over from *Ireland*. It was alleged that we ought so to decline

until there had been an inquiry here by a jury. Now the answer seems to me to be that we could not summon a jury for that purpose. Then ought we upon an inquiry before one or more of us to enter upon the question of whether we ought to act or not? We ought to act, unless there is a case also for a *supersedeas* in *Ireland*. Then if we were to enter upon the inquiry, and were then to refuse to act upon the ground really and substantially that there ought to be a *supersedeas* in *Ireland*, unless the *supersedeas* in *Ireland* were granted there would be a conflict of decision between the two Courts. In *Ireland* there would be a refusal to grant a *supersedeas*. In *England* there would be a refusal to act, founded upon an opposite view of the same evidence and the same facts. That seems to me to be a conflict into which the Court ought not to enter, and that therefore this Court ought not to enter upon the inquiry whether they will or will not act, until there has been an application for a *supersedeas*. That I understand was the decision of Lord Justice *Cotton*.

HOLKER, L.J.:—

I am of the same opinion.

It was agreed that the petition should stand over for three months for the purpose of enabling an application to be made to the Court in *Ireland*.

Solicitors for Petitioner: *Bolton, Robbins, & Busk.*
Solicitors for Respondents: *Johnsons, Upton, & Co.*

M. W.

C. A.
1882
March 3.

In re GENERAL FINANCIAL BANK.

Company—Winding-up—Appointment of Official Liquidator—Rival Petitions—Costs.

An official liquidator ought not to be appointed on the hearing of a winding-up petition, it being now the settled practice to direct a reference to Chambers for that purpose.

A creditor who presents a petition for winding-up in ignorance of a prior petition is entitled to his costs up to the time when he has notice of the prior petition, but if he then proceeds, he will not be allowed his further costs; unless he has good reason to suppose that the other petition is not *bonâ fide*, in which case he is justified in proceeding and may be allowed his costs.

ON the 4th of February, 1882, Mr. *John Burbidge*, a creditor of the *General Financial Bank, Limited*, presented a petition for winding up the company, and the usual advertisements appeared on the 6th of February.

Another petition had been presented on the 1st of February by the firm of *Ashley, Carr, & Co.*, who were also creditors of the company, for a similar purpose, the advertisements of which appeared on the 3rd of February.

Burbidge did not know of this petition until the day on which he advertised his own petition.

Before either of the petitions was heard the chairman and secretary of the company were appointed interim receivers and managers of the company.

Ashley, Carr, & Co.'s petition came on for hearing before Vice-Chancellor *Bacon* on the 11th of February, when *Burbidge* appeared and asked that it might stand over in order that both petitions might come on together. However, the Vice-Chancellor declined to accede to this application and made an order for winding up the company on *Ashley, Carr, & Co.'s* petition, with the usual order as to the costs of the Petitioners and the other parties appearing; and he at the same time appointed Mr. *F. Maynard* official liquidator in the winding-up.

On the 24th of February *Burbidge's* petition came on for hearing before Vice-Chancellor *Bacon*, and at the same time a motion by *Burbidge* that he might have the carriage of the winding-up order and that there might be a reference to Chambers to appoint

an official liquidator. The Vice-Chancellor made no order on the petition, and refused the motion with costs.

It appeared that before the presentation of *Ashley, Carr, & Co.'s* petition the company had agreed to indemnify them against the costs of the petition.

Burbidge appealed from the Vice-Chancellor's decision both on the petition and on the motion.

Millar, Q.C., and *Grosvenor Woods*, for the Appellant:—

The Appellant had no notice that the rival petition had been presented when he advertised his own petition. Therefore he ought not to have been deprived of his costs. Moreover *Ashley, Carr, & Co.* were indemnified against the costs by the company, and the Appellant has reason to suspect that their petition was collusive. Therefore he was justified in going on with his petition.

At all events the Vice-Chancellor was not justified in appointing a liquidator at the time when the order was made. The usual and proper course is to order a reference in Chambers, when any persons who object to the liquidator proposed by the petitioner may have an opportunity of stating their objections.

E. S. Ford, for a creditor supporting the appeal.

Horton Smith, Q.C., and *Terrell*, for the official liquidator.

Kenyon Parker, for *Ashley, Carr, & Co.*:—

Our petition was presented and advertised first, and is entitled to priority. There is no proof of collusion or *mala fides*. The indemnity was mere waste paper; it did no good or harm to any one. At all events, *Burbidge* knew nothing of it, therefore it is no excuse for his carrying on his own petition. There is no settled rule as to the appointment of liquidator. The practice varies in different branches of the Court. With respect to the conduct of the winding-up, we are not anxious about it and leave it in the hands of the Court.

Fooks, for the company.

JESSEL, M.R.:—

I am afraid there has been a little miscarriage of justice in this

C. A. 1882

In re GENERAL FINANCIAL BANK.

Jessel, M.R.

case, and the only thing I regret is that it will throw further costs on the contributories of this company.

First of all, as to the practice. I have indicated for years past that the practice was settled that the Court ought not to make an order on the hearing of a winding-up petition for the appointment of an official liquidator, but that this should be done in Chambers. The reasons for the practice are obvious; because if the appointment of an official liquidator were made in the first instance, everybody objecting to the liquidator named by the Petitioner would instruct counsel, and you might have numerous sets of counsel appearing for the various creditors and contributories, and discussing the question in Court at enormous expense, and without those means of investigation which the Judge possesses in Chambers. I thought this was the settled practice, and I wish to lay down for the future that it ought to be so, and that it is the opinion of the Judges of the Court of Appeal, which every Judge of first instance ought to follow. But in order to shew that it is the present practice I will refer to the well-known book of Mr. *Buckley* on the Companies Acts (1), where there is this sentence: "The official liquidator may be appointed at the hearing of the petition, but he will not be so appointed except by consent; and the present practice appears to be in all cases to direct a reference to Chambers." At all events that is to be the practice in future. If there is an urgent necessity for the appointment of a liquidator, the Court can appoint an interim liquidator, and that is the mode of getting over the difficulty. In some cases you may not want a liquidator but only a receiver. He may be appointed also if the Court thinks fit.

The next question we have to consider is the costs of Mr. *Burbidge's* petition. Now Mr. *Burbidge*, a *bonâ fide* creditor, presented a *bonâ fide* petition, and at the time he presented it he did not know of the petition of *Ashley, Carr, & Co.*; he was therefore, according to the ordinary practice of the Court entitled to his costs up to a certain point, that is, until he was aware, as he was on the 6th of February, of the advertisement of *Ashley, Carr, & Co.'s* petition. Then in ordinary cases he ought to have stayed his hand and not gone on with his petition. A second petitioner is not justified in an ordinary case in going on with his petition,

(1) 3rd ed. p. 210.

but if it turned out that the first petition was not *bonâ fide* or was collusive, he would be justified. It has turned out in this case that *Ashley, Carr, & Co.* communicated with the company and got an indemnity against costs. What does that mean? It means, that if they allow their petition to be dismissed the company must pay their costs. It was argued that when you come to look at the indemnity it was useless if the company was wound up. That may be so, but it was to be used in this way, that they might persuade *Ashley, Carr, & Co.* to dismiss their petition, and then the indemnity would work and they would get their costs. Therefore, whether it was honest on *Ashley, Carr, & Co.'s* part or not, Mr. *Burbidge* will get the benefit of that. I do not know whether he knew of it, but that being so, I think he was entitled to go on and is entitled to the costs of his own petition.

Then the next question is, what ought to be done with it. I think the right order will be to discharge the order made in the Court below, and make one order on the two petitions—the usual winding-up order—to give to the petitioners one set of costs, and the creditors their costs of appearing in the usual way, and the company, of course, their usual costs.

The only other question is as to the conduct of the winding-up, but that is not really disputed, and therefore I feel no doubt that Mr. *Burbidge* should have it. That disposes of everything, except the costs of the official liquidator, which must be paid out of the assets. He has done nothing wrong, he was entitled to appear, he was instructed to submit the matter to the Court, which was a proper course to take, and he must have his costs out of the assets. I suppose there are no accounts to take, as he has transacted no business.

[*Horton Smith*:—I am told he has done something in the winding-up.]

Jessel, M.R.:—

Then there will be the usual order to take his accounts and discharge him.

Lindley, L.J.:—

I am of opinion that the order stated by the Master of the

C. A. 1882 *In re* General Financial Bank. Lindley, L.J.

Rolls is the right one to make. As regards the practice of appointing the liquidator in Court, according to my recollection that practice was altered many years ago. The 8th rule gave the the Judge a discretion, and enabled him to appoint a liquidator at any time, and thus sanctioned the appointment of the liquidator at the hearing of the petition. That gave rise to this abuse, that the prayer of the petition named the liquidator proposed; and every person who objected to the liquidator named could appear and oppose his appointment. That was stopped by a decision of Lord *Romilly*. After that it became the practice to refer the matter for the appointment of the liquidator to chambers. I think Mr. *Buckley* is warranted in asserting that it has been the practice for many years always to refer the appointment of the liquidator to chambers; and I think it is a great pity that that practice should be departed from, because we know perfectly well that abuse would arise if we went back to the old practice. Therefore, I have no doubt but that the appointment of the official liquidator ought not to have been made.

Then with regard to *Burbidge's* petition; now we understand the facts, I think he was justified in presenting it. He did so at his own risk, and he took the chance of getting his costs; but the indemnity, though he may not have known of it, shews he was justified in continuing his petition. I understand the indemnity in the same way that the Master of the Rolls understands it; the other petition was a collusive petition; it was a petition that any *bonâ fide* creditor was entitled not to trust to; he might say he did know what would become of it. The existence of the indemnity itself would be sufficient to shew it was not right.

The result is that the order appealed from should be discharged, that there should be an order upon both petitions, the conduct of the winding-up given to *Burbidge*, the receiver continued, and a reference to chambers. The costs of all parties to come out of the assets, including the costs of Mr. *Ford's* clients.

Solicitors: *Bellamy, Strong, & Baker; Brandons; Plunkett & Leader; Romer; D. Howell.*

M. W.

Ex parte SOLOMON. *In re* TILLEY.

C. A. 1882 March 9.

Composition Resolutions—Registration—Examination of Debtor at Creditors' Meetings—Presence of Shorthand Writer—Duty of Chairman—Statement of Affairs—Insufficiency—Irregularity of Proceedings—Order to summon fresh Meeting—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 126—*Bankruptcy Rules*, 1870, *rr.* 208, 295.

Inasmuch as the answers given by a debtor to questions put to him at the meetings of his creditors under a liquidation petition form part of his statement of affairs, it is essential that a written record of those answers should be made, and therefore a creditor who desires to examine the debtor is entitled to have a shorthand writer present at the meeting to take notes of the examination, though, if several creditors wish to employ a shorthand writer, the meeting has power to limit the number who may be present.

It is no part of the duty of the chairman of the meeting to take notes of the debtor's examination.

Per JESSEL, M.R.:—If for any reason a debtor who files a liquidation petition is unable to produce a proper statement of his affairs, he cannot have a liquidation by arrangement or a composition, but must submit to be made a bankrupt.

A meeting of creditors under a liquidation petition refused to allow a shorthand writer to be present on behalf of one of the creditors to take notes of the debtor's examination by him, and no note of the examination was taken. The debtor's written statement of his affairs was, in the opinion of the Court, grossly insufficient. Resolutions accepting a composition were passed by the statutory majority:—

Held, that the proceedings were irregular, and that the resolutions ought not to be registered:

But *held*, that there being no proof of *mala fides*, and as the large majority of the creditors had shewn that they desired to have a composition, a fresh meeting ought to be summoned.

And leave was given to use at the fresh meeting the proofs and proxies which were already on the file.

Ex parte Best (1) explained.

THIS was an appeal from an order made by Mr. Registrar *Pepys*, acting as Chief Judge in Bankruptcy, directing the registration of resolutions for a composition which had been passed by the creditors of *Samuel Tilley*.

The debtor was a solicitor, and had carried on business in partnership with *D. R. Soames*. The partnership was dissolved by

(1) 18 Ch. D. 488.

C. A. 1882 *Ex parte* SOLOMON. *In re* TILLEY.

mutual consent on the 7th of December, 1881, and the business was thenceforth carried on by *Soames* alone, the notice of dissolution stating that all the assets of the firm would be received and the liabilities paid by him. Soon after the dissolution *Tilley* filed a liquidation petition. The first meeting of the creditors was held on the 9th of January, 1882. The statement of his affairs produced by the debtor shewed that his joint debts and liabilities amounted to £7418 17*s.* 9*d.*, and his separate debts and liabilities to £12,379 5*s.* 4*d.*, making a total of £19,798 3*s.* 1*d.* He estimated his joint assets at £9650, viz., book debts estimated to produce £9500, and office furniture £150, and his separate assets at £1494 15*s.* The list (H) of book debts due to his late firm contained the following statement:—

"The book debts of my late firm, as far as I have the means of ascertaining, the greater part being actions and suits which are pending and other matters in progress, which I estimate to realise about . . . . . £9500."

"The costs outstanding forming the above in most cases are neither made out nor taxed."

L. A. Solomon, a creditor of the debtor of £953, instructed his solicitor, Mr. *A. S. Jonas*, whom he appointed his proxy, to attend the meetings of the creditors under the petition. *Jonas* accordingly attended the first meeting, and, it being his intention to examine the debtor about his affairs, he took with him one of his clerks, who could write shorthand, in order that he might take notes of the debtor's answers. At the meeting *Jonas* commenced examining the debtor, and the clerk commenced taking notes of his answers. Some one called the attention of the chairman of the meeting to the fact that a reporter was present, and the chairman then asked the clerk whether he was a creditor or a proxy for a creditor. He replied that he was not. *Jonas* then said that the clerk was there by his instructions for the purpose of taking notes of the debtor's examination, and insisted that he was entitled to have this done. The chairman said it was an irregular proceeding, and put it to the meeting whether they desired that the clerk should remain or not. A resolution was then proposed, and carried by a large majority, that the clerk

should withdraw, and he accordingly left the room. *Jonas* proceeded with his examination of the debtor, but no notes of his answers were taken. The creditors afterwards resolved, by the proper majority, to accept a composition of 2*s.* 6*d.* in the pound in satisfaction of their debts, *Solomon's* solicitor, on his behalf, dissenting.

The second meeting of the creditors was held on the 23rd of January. *Jonas* again attended as proxy for *Solomon*. He desired again to examine the debtor, and he took with him a professional shorthand writer for the purpose of taking notes of the examination. *Jonas* commenced examining the debtor, and the shorthand writer commenced taking notes. The debtor's solicitor then called the attention of the chairman to the fact that a gentleman was present who was neither a creditor nor a proxy. The chairman thereupon put it to the meeting whether the shorthand writer should be allowed to remain, and a resolution was proposed, and carried by a large majority, that he should withdraw. He accordingly withdrew, and *Jonas*, considering it useless to continue his examination, asked the debtor no more questions. The creditors, by the proper majority, confirmed the resolutions passed at the first meeting. On both occasions *Jonas*, as proxy for *Solomon*, voted against the resolutions. The registration of the resolutions was opposed by *Solomon*, on the ground, *inter alia*—(1.) That the statement of affairs produced by the debtor was not sufficient; (2.) That the debtor was possessed of considerable assets which he had not fully disclosed, or of which he had not given sufficient particulars in his statement of affairs; (3.) That the composition resolutions were passed or confirmed in the interest and for the advantage of the debtor, and not in the interest of or for the advantage of the creditors; (4.) That *Solomon* and his proxy were at both the meetings prevented from having a proper examination of the debtor, and from having such examination taken down in writing.

The Registrar overruled all the objections, and ordered the resolutions to be registered. *Solomon* appealed.

Winslow, Q.C., and *S. Woolf*, for the Appellant:—

The proceedings were irregular and the resolutions were not

C. A. 1882 *Ex parte* SOLOMON. *In re* TILLEY.

passed *bonâ fide*. The duty of the Registrar on an application to register resolutions is laid down in *Ex parte Levy* (1). The debtor cannot be examined before the Registrar, but what takes place at the meetings can be brought before him, and the debtor's answers to questions put to him at the meetings form part of his statement of affairs: *Ex parte Aaronson* (2). An examination of the debtor is a mere farce if no written record of his answers can be kept. The person who is conducting the examination cannot himself take notes, and it is only reasonable that he should be allowed the assistance of a shorthand writer.

The statement of the debtor's partnership assets is clearly insufficient, and in the face of such an insufficient statement the majority of the creditors could not have been acting *bonâ fide* in passing the resolutions.

Robinson, Q.C., and *T. L. Wilkinson*, for the debtor:—

The meeting is a meeting of creditors; no one but a creditor or a proxy is entitled to be present. If the Appellant is right in what he claims, every creditor might bring a shorthand writer with him. A creditor can take notes himself, or he may ask the chairman of the meeting to do so.

[JESSEL, M.R.:—It is no part of the chairman's duty to take notes of an examination, and the creditor is not bound to trust a hostile chairman.]

It is not the practice to allow shorthand writers to be present at these meetings. If several creditors employed different shorthand writers to take notes there might be a conflict in their notes.

[JESSEL, M.R.:—Not so great a conflict as if the matter rested on memory. It might, however, be reasonable not to allow more than two shorthand writers to be present.

COTTON, L.J.:—The debtor's solicitor is always allowed to be present, because it is reasonable that he should be.

JESSEL, M.R.:—There must be a rational mode of conducting business.]

(1) Law Rep. 11 Eq. 619. (2) 7 Ch. D. 713.

As to the statement of the Plaintiff's assets, the partnership has been dissolved, and the debtor is entirely dependent on his late partner for information. But, if there is any insufficiency in the statement of affairs, the creditors are the judges: *Ex parte Walter* (1).

At any rate there has only been an irregularity in the proceedings, and the debtor ought to be allowed to summon a fresh meeting of the creditors.

Winslow, in reply, as to summoning a fresh meeting:—

A fresh meeting is allowed only when there has been a mere slip in the proceedings, so that there has been in truth no meeting: *Ex parte Best* (2); *Ex parte Jerningham* (3); *Ex parte Cobb* (4). Here the creditors have deliberately gone wrong. Creditors ought to be compelled to proceed regularly.

JESSEL, M.R.:—

This appeal raises a point of some importance as regards the general administration of bankruptcy law.

The debtor, who was a solicitor, filed a liquidation petition. One of the creditors appointed his solicitor as his proxy, and requested him to examine the debtor at the meeting held under the petition. The solicitor went to the first meeting, taking with him a clerk, who was a shorthand writer, to make notes of the examination. At the meeting, it not being suggested that any other shorthand writer was present, the objection was raised that the clerk was a stranger, that he was not a creditor or a proxy for a creditor, and that he had no right to be present. The creditors thereupon resolved that he must withdraw, and he was immediately turned out of the room. The result was that, as the solicitor was unable himself to take any notes of the debtor's examination, and no one else took any notes, no record was made of the examination, and there was nothing upon which the Registrar could act in relation to it. The creditors resolved to accept the debtor's offer of a composition, and thereupon a second meeting of the creditors became necessary to confirm the resolution. The

(1) 2 Ch. D. 326.
(2) 18 Ch. D. 488.
(3) 9 Ch. D. 466.
(4) Law Rep. 8 Ch. 727.

C. A. 1882

Ex parte SOLOMON. *In re* TILLEY.

Jessel, M.R.

solicitor again attended at the second meeting, and took with him on this occasion a professional shorthand writer. Thereupon this took place which is very singular. The debtor's solicitor, who in this sense of the word was himself equally a stranger, called the attention of the chairman to the presence of a stranger. The same thing then occurred which occurred at the first meeting, and the shorthand writer was turned out.

Now the Act of Parliament is silent as to the persons who may be present at the meetings of creditors, but it has always been the practice to allow the debtor's solicitor to be present to protect him. This is a rational practice. I believe it has also been the practice when an accountant has been employed by the debtor to prepare his statement of affairs, to allow the accountant or his clerk to be present. But how is it possible for justice to be obtained if no record on which the Registrar can act is kept of the evidence given by the debtor at the meeting? Is it rational not to allow an examining creditor to have a note taken by a shorthand writer of what is said by the debtor? It appears to me that it is wholly irrational. It is said that, if one creditor is allowed to bring a shorthand writer, every creditor might have a shorthand writer of his own present. This is not a very likely thing to happen, for a shorthand writer is a costly gentleman. But, supposing twenty shorthand writers were present on behalf of twenty different creditors, it would be a reasonable thing for the meeting to say that only two of them should be allowed to remain. That is the answer to this suggestion. I think, therefore, that on this ground the proceedings at both the meetings were wholly irregular.

Another fatal objection to the proceedings is this. The debtor is bound to produce to the meetings a statement of his affairs, and it has been held that this statement must be in writing. It must be a statement shewing the whole of his assets and debts. In the present case the debtor had been a member of a partnership firm. His share in the business was apparently a half, and that share was his largest asset. And this is the way in which it is stated by him. [His Lordship read the statement as above mentioned.] To call that a statement of his assets is ludicrous; by it the debtor pledges himself to nothing. Of course he

ought to have given the names of the debtors to the firm, and, if the bills of costs had been made out he should have stated the amounts of them; if they had not been made out, he should have given an estimate. He should have applied to his late partner for the necessary information. If, however, for any reason it is impossible for him to make a proper statement, the only result is that he cannot have a liquidation by arrangement or a composition, but he must submit to be made a bankrupt.

The next question is, what ought now to be done? I think there has been an irregularity in the proceedings, but I can see no evidence of *mala fides* on the part of the debtor, or the creditors. The offer of a composition of 2*s.* 6*d.* in the pound may be a very fair offer; I have no means at present of giving an opinion whether it is or is not. Owing to an irregularity in the proceedings the resolutions which have been passed cannot be registered. But, when we see that the great majority of the creditors desire to have a composition, why should we drive the debtor into bankruptcy? I think that the law on this point is correctly stated by Mr. *Robson* in his book on Bankruptcy (1). He says, "If the opinion of the creditors has been validly taken, there is no jurisdiction to grant a new meeting under the same petition. But if, through some irregularity or some accident or venial mistake on the part of the debtor or creditors, the opinion of the creditors has not been validly taken, a new meeting under the same petition may be called." I agree that if the debtor had been guilty of gross misconduct, we ought not to give him a new chance of escaping bankruptcy, and that, I think, is the explanation of the refusal of the Court in *Ex parte Best* (2) to allow a fresh meeting of the creditors to be summoned. The Lord Chancellor thought that the debtor had been guilty of a fraudulent preference; that material facts had been concealed from the creditors; and that the creditor who had examined the debtor at one of the meetings had been intimidated. In the present case, considering the wish of the great majority of the creditors, and seeing that the debtor has not been guilty of any misconduct, I think that a fresh first meeting ought to be summoned. With regard to the costs, if a composition is agreed to, the debtor must pay them; if a liquida-

(1) 4th Ed. p. 761. (2) 18 Ch. D. 488.

C. A. 1882

Ex parte SOLOMON. *In re* TILLEY.

tion by arrangement is resolved on, they will be paid out of his estate.

COTTON, L.J.:—

This is an application to set aside an order allowing the registration of composition resolutions. By sect. 126 of the Act, great power is given to the majority of the creditors. It is probably a beneficial power, but the creditors must be carefully watched in their exercise of it, and they must strictly follow the directions of the Act. One of those directions is that the debtor must be present at both the meetings, and answer any inquiries made of him, and it was decided in *Ex parte Aaronson* (1) that his answers to the questions put to him will go before the Registrar as part of his statement of affairs. It appears to me that that direction and that decision imply that some note in writing of the examination ought to be made, and in questions of figures it is of the utmost importance to a creditor who examines the debtor that he should have some written note of the examination to refer to. In the present case the Appellant was not allowed to have a note of the examination taken at the meetings. In my opinion the exclusion of the persons whom he brought with him to take notes was entirely wrong. It is urged that the meeting is a meeting of creditors. But it is nowhere said in the Act, or in the Rules, that no one who is not a creditor, or a proxy for a creditor, shall be present. Of course the resolutions must be passed by creditors, and only creditors can vote upon them. But it is nowhere said that no other person shall be present, when his presence is essential for reasonably conducting the proceedings. In my opinion it is essential—not, indeed, that every creditor shall have a shorthand writer of his own present, but that there shall be a reasonable means of taking a record of the debtor's examination. And the fact that the Appellant was prevented from having such a record made is a sufficient ground for refusing to register the resolutions. I also agree with the Master of the Rolls as to the insufficiency of the debtor's statement of his assets. But it is capable of being supplemented. In my opinion, therefore, the resolutions ought not to be registered. I agree, however, that as

(1) 7 Ch. D. 713.

there has been no *mala fides*, the debtor ought to have an opportunity of summoning a fresh meeting of his creditors.

C. A. 1882 *Ex parte* SOLOMON. *In re* TILLEY.

LINDLEY, L.J.:—

I am of the same opinion. It appears to me that the proceedings at both the meetings were conducted in a way which was not fair to the dissenting creditors. There was no real opportunity of examining the debtor. The conduct of the majority in excluding the assistance of which the examining creditor stood in need was unreasonable. And, taking it in conjunction with the insufficiency of the debtor's statement of his affairs, I think that the resolutions ought not to be registered. But I agree that there has been nothing more than an irregularity, and that the proper course is to allow a fresh meeting to be summoned.

An order was accordingly made to summon a fresh first meeting of the creditors, and leave was given to use at it the proofs and proxies which had been already filed.

Solicitor for Appellant: *A. S. Jonas.*
Solicitors for Debtor: *Dubois & Reid.*

W. L. C.

Ex parte VANDERLINDEN. *In re* POGOSE.

C. A. 1882 *March* 16.

Bankruptcy Petition—Secured Creditor—Statement of readiness to give up Security — Valuation — Formal Defect—Amendment — Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 6, 82—*Bankruptcy Rules*, 1870, *r.* 208—*Bankruptcy Forms*, 1870, *No.* 10.

If a petitioning creditor who holds security for his debt is willing to give an estimate of the value of his security, sect. 6 of the *Bankruptcy Act*, 1869, does not require this fact to be stated in the petition, but it is sufficient for the Petitioner to give notice of it to the Respondent, before the hearing of the petition.

It is, however, proper as a matter of convenience that the Petitioner's willingness to estimate the value of his security should, in accordance with Form No. 10, be stated in the petition.

A petitioning creditor stated in his petition that he held no security for his debt. He in fact held a charge on some property of the debtor, and before the hearing of the petition his solicitors, in a letter to the debtor's

C. A.
1882
Ex parte VANDERLINDEN.
In re POGOSE.

solicitors, said that the security was not valued at anything, and at the hearing it was stated that the Petitioner was ready to give up his security for the benefit of the creditors. The Registrar dismissed the petition, on the ground that the Petitioner's readiness to give up his security ought in conformity with sect. 6 to have been stated in the petition.

Held, that the defect was a merely formal one, and that the Registrar ought to have amended the petition by adding a statement of the security and that the Petitioner was ready to give it up, and then to have made an adjudication.

And the Court of Appeal made the amendment and the adjudication, but gave no costs of the appeal.

THIS was an appeal from an order made by Mr. Registrar *Hazlitt*, acting as Chief Judge in Bankruptcy, dismissing with costs a bankruptcy petition which had been presented by *Jacques Vanderlinden* against *P. T. N. Pogose*.

The petition was presented on the 17th of January, 1882. It alleged that *Pogose* was indebted to the Petitioner in the sum of £180 12*s*., and it stated that the Petitioner did not hold any security on the bankrupt's estate, or on any part thereof, for the payment of the said sum.

The hearing of the petition was fixed for the 2nd of February. *Pogose* had in fact on the 10th of January, 1882 given to the Petitioner a written document whereby he charged all his interest in certain properties in *Bengal* with the payment to the Petitioner of the sum of £250, which included the £180 12*s*. On the 27th of January, 1882, the Petitioner's solicitors wrote to *Pogose's* solicitors a letter in which (*inter alia*), they said: "You are aware whatever charge our client holds is given up by the fact of his petition not valuing it, and if the adjudication takes place, this charge will enure to the general body of creditors, as it is not valued at anything."

On the 28th of January, *Pogose* gave notice to the Petitioner that he should dispute the making of an adjudication, on the ground that the statement in the petition that the Petitioner did not hold any security for the debt was untrue.

On the hearing of the petition a great deal of evidence was gone into to shew that it had been presented maliciously, but the Registrar dismissed it on the ground that it ought to have stated the charge which the Petitioner held for his debt, and that he was ready to give it up for the benefit of the creditors in the event of

an adjudication being made. At the hearing of the petition it was stated that the Petitioner was ready to give up his security.

The Petitioner appealed.

A. Beddall, for the Appellant:—

The Registrar ought not to have dismissed the petition. There was nothing more than a formal defect, and he ought to have amended the petition, as he had power to do under rule 208 of the *Bankruptcy Rules*, 1870. Strictly speaking, under sect. 6 (1) the petition ought to have stated that the Petitioner was ready to give up his security, though if he was willing to value the security this need not have been stated in the petition. But the letter of the 27th of January told the debtor's solicitors that the Petitioner valued his security at nothing at all, and on the hearing it was stated that he was ready to give it up. The Registrar ought to have amended the petition, and then to have made the adjudication.

E. Cooper Willis, Q.C., and *F. Cooper Willis*, for the debtor:—

The petition was properly dismissed. The Petitioner's readiness to give up his security ought to have been stated in the petition. If he values the security at nothing, that is the same thing as giving it up.

[JESSEL, M.R.:—The real question is whether the Registrar should not have amended the petition. The Court has power, under rule 208, to suggest an amendment itself. If the Petitioner had valued his security at a farthing he need not have stated that in the petition; if he valued it at nothing he ought to have stated in the petition that he was ready to give up the security. Is not

(1) Sect. 6 provides that the debt of a petitioning creditor "must not be a secured debt, unless the Petitioner state in his petition that he will be ready to give up such security for the benefit of the creditors in the event of the debtor being adjudicated a bankrupt, or unless the Petitioner is willing to give an estimate of the value of his security, in which latter case he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him after deducting the value so estimated, but he shall, on an application being made by the trustee within the prescribed time after the date of adjudication, give up his security to such trustee for the benefit of the creditors upon payment of such estimated value."

C. A. 1882

Ex parte VANDERLINDEN. *In re* POGOSE.

the omission to make this statement a "formal defect" within sect. 82 (1) ?]

The Court must look at the state of things at the time when the petition was presented; it does not follow that at that time the Petitioner was ready to give up his security. Before the Registrar it was argued that it was not necessary to mention the security in the petition. When a Petitioner's security has not been mentioned in his petition, the practice has always been to have the petition amended and served again.

JESSEL, M.R.:—

The Act does not require that to be done. Mr. *Murray* (the Registrar in Court) says that has not been the practice; if it had been, it would not have been right. I am sorry, very sorry, to see this kind of thing. I thought the day had passed for raising such technical objections. But I am satisfied that the Act enables us to do what is right. Sect. 6 is curiously worded. For some reason or other, which I am as little able to divine as Mr. *Willis* is, the Petitioner's readiness to give up his security must be stated in the petition, though his willingness to give an estimate of its value need not be stated. But when we look at Form No. 10 of a petition given in the schedule to the Rules of 1870, we see that it was expected that when the Petitioner is willing to give an estimate of the value of his security, this would be stated in the petition. I do not say it is required that the statement should be made in the petition, but it is reasonable that it should be. It comes, then, to this: if the petition says nothing about valuing the security, but before the hearing the Petitioner gives notice to the Respondent that he estimates the value of his security at a farthing, that is sufficient, but if he says that he estimates the value at nothing, it is not sufficient. When it is reduced to that, what ought the Court to have done? What is the meaning of the word "formal defect"? I cannot conceive anything more

(1) Sect. 82: "No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the Court before which an objection is made to such proceeding is of opinion that substantial injustice has been caused by such defect or irregularity, and that such injustice cannot be remedied by any order of such Court."

"formal" than the omission to say, I value my security at a farthing. If that is not "formal" I do not know what is. What is an "irregularity" if that is not? The only marvel is that the point should be argued. But if sect. 82 does not apply, there is rule 208, which enables the Court to allow amendments. It is urged that the Petitioner must himself apply for an amendment. Why should not the Court suggest it? I really do not know. The Petitioner's counsel was entitled to argue that no amendment was necessary. It appears to me that we ought to amend the petition by introducing a statement that the Petitioner is ready to give up his security for the benefit of the creditors, and then the order of adjudication should be made. With regard to the costs, I do not wish to encourage irregularities of this kind, and I think there should be no costs of the appeal. The Respondent may be able to pay the debt, and to enable him to do so the adjudication will not be advertised for a week.

COTTON, L.J.:—

I also think that the petition ought not to have been dismissed. In my opinion there was an irregularity in it. It ought to have stated that the Petitioner held a security for his debt, and that he was ready to give it up for the benefit of the creditors. But I think the proper course would have been for the Registrar to decide that the petition ought to be amended, and then to amend it. I quite agree as to the costs.

LINDLEY, L.J.:—

I am of the same opinion.

Solicitors for Petitioner: *Beyfus & Beyfus.*
Solicitors for debtor: *Williams & Graham.*

W. L. C.

Applied in RE WESTINGHOUSE ELECTRIC CORPN (No 2) [1977] 3 All ER 717

C. A.
1882
C. J. B.
Feb. 20.
C. A.
March 16.

Ex parte REYNOLDS. *In re* REYNOLDS.

Witness—Privilege—Answer tending to criminate—Refusal to answer—Power of Judge—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71) *s.* 96.

Where a witness refuses to answer a question put to him on the ground that his answer might tend to criminate himself, his mere statement of his belief that his answer will have that effect is not enough to excuse him from answering, but the Court must be satisfied from the circumstances of the case, and the nature of the evidence which the witness is called upon to give, that there is reasonable ground to apprehend danger to him from his being compelled to answer.

But, if it is once made to appear that the witness is in danger, great latitude should be allowed to him in judging for himself of the effect of any particular question.

Subject, however, to that reservation, the Judge is bound to insist on the witness answering, unless he is satisfied that the answer will tend to place him in peril.

Decision of the Court of Queen's Bench in *Reg* v. *Boyes* (1) approved and followed.

LEDRU ROLLIN REYNOLDS was adjudicated a bankrupt on the 23rd of September, 1881.

At the instance of the trustee in the bankruptcy a summons was issued under sect. 96 of the *Bankruptcy Act*, 1869, calling upon *George Kossuth Mazzini Reynolds*, a brother of the bankrupt, to attend before the Court and be examined; the object of the examination being to inquire into the particulars of a post-nuptial settlement purporting to have been executed by the bankrupt on the 4th of December, 1880, of which *George K. M. Reynolds* appeared to be one of the trustees.

The witness attended before Mr. Registrar *Hazlitt* on the 24th of January, 1882, and, upon the settlement being placed before him, was asked whether the signature of his name at the foot of the deed was in his handwriting.

The witness objected to answer the question on the ground that his answer might tend to criminate himself; and on the like ground refused to answer a series of question put to him for the purpose of ascertaining whether he had executed the deed,

(1) 1 B. & S. 311.

whether he was the trustee of it, and under what circumstances it was executed.

The Registrar being of opinion that some of the questions were legal and proper questions, and that the witness was bound to answer them, referred his further examination to the Chief Judge. The summons was heard before the Chief Judge on the 20th of February, 1882.

Arthur Charles, Q.C., and *F. Cooper Willis*, for the trustee:—

Although it is unquestionably true that the oath of a witness tending to criminate himself is chiefly to be looked at, the Court must be satisfied that the objection to answer is a genuine one, and will not allow a mere technical refusal to answer to prevail. We ask the Court to direct the witness to answer the question, his objection being manifestly not genuine, inasmuch as to every question relevant or irrelevant he gives the same stereotyped objection.

Horton Smith, Q.C., and *Terrell*, for the witness:—

The object of this examination was to get evidence with respect to the bankrupt's property. The refusal to answer is the privilege of the witness: *Ex parte Schofield* (1). The witness is entitled to say, "If I answer one question, it will be a link in a chain of evidence which may be used against me." During part of the examination the witness was deprived of his solicitor's services, and this has been held good ground for refusing to answer: *Ex parte Mackenzie* (2). One of the earlier authorities is *Fisher* v. *Ronalds* (3), where Mr. Justice *Maule* said, "We need not decide upon the present occasion that the statement of the witness is conclusive, though I think the Judge is bound by the witness's oath; otherwise you might exhaust all possibilities consistent with a man's innocence, and so convict him even of murder." This dictum was followed by *Adams* v. *Lloyd* (4); *Osborn* v. *London Dock Company* (5); *Reg* v. *Boyes* (6).

(1) 6 Ch. D. 230.
(2) Law Rep. 10 Ch. 88.
(3) 12 C. B. 762.
(4) 3 H. & N. 351.
(5) 10 Ex. 698.
(6) 1 B. & S. 311.

C. A. 1882

Ex parte REYNOLDS. *In re* REYNOLDS.

BACON, C.J. :—

The law is well settled and has been settled for many years. I do not say it is not difficult to deal with a case where the witness asserts that he will not answer because his answers might tend to criminate him, but that difficulty is to be overcome. In several of the cases referred to it is laid down that a Judge must exercise some discretion when he has to deal with such an objection. It cannot be disputed that it is plain and distinct law. The case of *Ex parte Mackenzie* (1) establishes the principles in plain words, but it proceeds upon totally different grounds. That is not called in question in the slightest degree. It was about a bit of paper which was denied by the witness to have been written by him, and when asked whether it was written by his authority he begs that his solicitor may see it before he answers. He does not refuse to answer. The examination was thereupon broken off, Lord Justice *Mellish* expressed himself distinctly thus (2): "In my opinion the refusal to answer the question till the solicitor had seen the paper was not such a refusal to give information as ought to affect the validity of the registration," that being the question before the Court.

What is the case before me? The witness is alleged to be a trustee of a settlement the validity of which the trustee in bankruptcy seeks to impeach. He is called as a witness, and the deed being produced, he is asked whether it is executed by him, and the answer is, "I decline to answer because it might criminate me." Am I not bound to exercise such portion of common sense as I possess, and to say whether an answer to that question can possibly criminate anybody? If a suit were instituted in the Court of Chancery against a trustee such a question would beyond all doubt, whether under the old practice or under the modern practice of interrogatories (the object of the Court being that there should be no needless expense in proving the execution of the deed), be allowed, and it could not upon any conceivable ground have the effect of criminating the witness. It is the same, I think, with all the other questions. It is not suggested that the witness has done anything criminal. It could not be criminal to execute a deed. It could not be criminal to deal with the property com-

(1) Law Rep. 10 Ch. 88. (2) Law Rep. 10 Ch. 91.

prised in the deed—if he did deal with it—I do not say that he did. It could not be criminal to charge him with having received a sum of £1000 and paid it unto his bankers. It cannot be said that any one of the questions put to the witness could ever form a link in any criminal action which might be brought against him. There is no doubt the principle is a very important one, I was going to say a sacred one, because the liberty of the subject is at all times a sacred matter, and if I saw there was any chance of the answer to the question whether he executed a deed or not forming a link in a chain, one end of which would be the accusation and the other the conviction of the witness, I should hesitate very much before I compelled him to answer; but as it stands no one who has listened to this examination can entertain any doubt that it comes clearly within the cases pointed out, where the Court has been satisfied that the witness is trifling with the Court, and is setting up excuses which have no kind of foundation. I do not hesitate to say that the witness is bound to answer the questions, and therefore he must submit to an examination before the Registrar. If he does not answer, I need not point out to him the consequence that would attend his refusal.

J. B. D.

The order made was that the witness should answer all lawful questions put to him, that the examination be referred back to the Registrar for that purpose, and that the witness should at his own expense attend the examination.

From this decision the witness appealed.

The appeal was heard on the 16th of March, 1882.

Horton Smith, Q.C., *Montagu Williams*, and *Terrell*, for the Appellant:—

A witness is entitled to decide for himself whether the answer to a question will tend to criminate him, and if he swears that it will have that effect, the Court will not compel him to answer. There are a number of *dicta* on the point, and they do not all agree, but it has never yet been decided by the Court of Appeal: *Reg.* v. *Garbett* (1): *Short* v. *Mercier* (2); *Fisher* v. *Ronalds* (3);

(1) 1 Den. C. C. 236; 2 C. & K. 474. (2) 3 Mac. & G. 205.
(3) 12 C. B. 762.

C. A. 1882

Ex parte REYNOLDS. *In re* REYNOLDS.

Adams v. *Lloyd* (1); *Osborn* v. *London Dock Company* (2); *Sidebottom* v. *Adkins* (3); *Reg.* v. *Boyes* (4); *Ex parte Schofield* (5).

At any rate it is clear that in the present case the witness, if he was compelled to answer the questions, might render himself liable to an indictment for conspiracy, and there is reasonable ground for not compelling him to answer.

A. Charles, Q.C., and *F. Cooper Willis*, for the trustee, were heard only on the second ground:—

It is clear that the refusal to answer is a mere pretext.

Horton Smith, in reply.

JESSEL, M.R.:—

There are two questions to be decided; one of general importance, the other confined to the circumstances of the particular case. The question of general importance is, whether, when a witness objects to answer a question put to him on the ground that the answer to it may tend to criminate him, the mere statement of his own belief that it will tend to criminate him is sufficient to excuse him from answering, or whether the Judge is entitled to decide, not merely accepting the witness's statement, whether the proposed question has really a tendency to criminate him, or may fairly be considered, under all the circumstances of the case, as having that tendency.

Now upon that, there are various *dicta* and one express decision in *Reg.* v. *Boyes*. I am quite aware that the decision of the Court of Queen's Bench in *Reg.* v. *Boyes* is not technically binding on this Court, but at the same time it is a decision of the full Court of Queen's Bench, composed at that time of very eminent Judges, and I need not say that I should differ from them with very great hesitation. The case was heard in the year 1861, and, as I read it, this very point was not merely the subject of *dicta*, but was clearly decided. The late Lord Chief Justice *Cockburn*

(1) 3 H. & N. 351.
(2) 10 Ex. 698.
(3) 5 W. R. 743.
(4) 1 B. & S. 311.
(5) 6 Ch. D. 230.

gave the judgment, in which the present Lord *Blackburn*, as well as Mr. Justice *Crompton* and Mr. Justice *Hill*, concurred. The Lord Chief Justice said (1): "It was also contended that a bare possibility of legal peril was sufficient to entitle a witness to protection; nay, further, that the witness was the sole judge as to whether his evidence would bring him into danger of the law; and that the statement of his belief to that effect, if not manifestly made *malâ fide*, should be received as conclusive. With the latter of these propositions we are altogether unable to concur. Upon a review of the authorities we are clearly of opinion that the view of the law propounded by Lord *Wensleydale* in *Osborn* v. *London Dock Company* (2), and acted on by Vice-Chancellor *Stuart* in *Sidebottom* v. *Adkins* (3), is the correct one; and that, to entitle a party called as a witness to the privilege of silence, the Court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. We indeed quite agree that, if the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question; there being no doubt, as observed by Baron *Alderson* in *Osborn* v. *London Dock Company*, that a question which might appear at first sight a very innocent one, might, by affording a link in a chain of evidence, become the means of bringing home an offence to the party answering. Subject to this reservation, a Judge is, in our opinion, bound to insist on a witness answering, unless he is satisfied that the answer will tend to place the witness in peril."

That decision, as it appears to me, states the law correctly, and if it were necessary for the Court of Appeal to affirm it, we should, I think, be doing well and wisely in saying that we do affirm it. It is unnecessary after it to refer to the prior authorities; they are all mere *dicta*. But, as regards the subsequent case of *Ex parte Schofield* (4), decided in 1877, I will say this, that I am not sure it is a mere *dictum*; I rather think it is a decision. There Lord Justice *James* said, with regard to an examination under

(1) 1 B. & S. 329.
(2) 10 Ex. 698.
(3) 5 W. R. 743.
(4) 6 Ch. D. 230.

C. A. 1882 *Ex parte* REYNOLDS. *In re* REYNOLDS. Jessel, M.R.

this very 96th section (1): "Of course when a witness objects on this ground to answer a question, the Judge will satisfy himself whether the objection is a genuine one."

And as regards the prior cases I will say this: In *Osborn* v. *London Dock Company* (2), we not only have the opinion expressed by a very eminent Judge, the late Lord *Wensleydale*, but we have citations there from three standard works on evidence, the works of the late Mr. *Best*, of the late Mr. *Phillips*, and of Mr. *Pitt Taylor*, and they all state the rule in effect in the way which was ultimately decided to be right in *Reg.* v. *Boyes* (3). They also state this, which is obvious, that if you allowed the witness merely on his own statement of his belief that an answer to the question would tend to criminate him (for that is all, he is only bound to believe that) to refuse to answer, it would enable a friendly witness, who wished to assist one of the parties, to escape examination altogether, and to refuse to give his evidence. That would be an evil so great as far to overbear, as a question of public policy, the danger, if it is to be treated as a danger, of occasionally assisting to convict a guilty man out of his own mouth. Perhaps our law has gone even too far in the direction of protecting a witness from the chance of convicting himself. But without at all impugning the policy of the law, there must certainly be a larger policy which requires that a witness should answer when the Judge thinks that he is objecting to answer, not *bonâ fide* with the view of claiming privilege to protect himself, but in order to prevent other parties from getting that testimony which is necessary for the purposes of justice.

And even those Judges who have entertained the contrary opinion have made an exception in the case of *mala fides*. I need only refer for that to what was said by the late Lord Chief Baron *Pollock* in *Adams* v. *Lloyd*, where, having stated the rule in favour of the protection of a witness on his own oath, he added (4): "The only exception I know of is this,—where the Judge is perfectly certain that the witness is trifling with the authority of the Court, and availing himself of the rule of law to keep back the truth, having in reality no ground whatever for claiming the

(1) 6 Ch. D. 233.
(2) 10 Ex. 698.
(3) 1 B. & S. 311.
(4) 3 H. & N. 362.

privilege, then the Judge is right in insisting on his answering the question."

Well now, this being so, the second question we have to consider is whether there is any reasonable ground for fearing that the questions, when answered, will tend to convict the witness of a criminal offence, or to criminate him in any way. Now, in order to decide that point the Court must consider what the nature of the case is, and what the witness has said. When we look at the questions which the witness has refused to answer, the conviction, I think, must force itself upon the mind of any one that he refused to answer because he did not want to give the information, and that he was trifling with the Court.

I do not for a moment think that the witness is under any *bonâ fide* belief that there will be any charge of conspiracy made against him, or that he had any idea of such a charge; in fact I think the notion of such an indictment could only present itself to the mind of some one who was very familiar indeed with the law of conspiracy. It appears to me that the witness did not wish to afford any assistance to the bankrupt's creditors in obtaining possession of the property which had been kept from them. I think that was the prevailing motive with him, and not any real fear of criminal proceedings.

That being so, I think he ought to answer the questions. He will of course be entitled to object to answer any particular question which obviously has a tendency to criminate him, or which, in the opinion of the presiding Judge, would tend to criminate him in regard to any matter, or which may be reasonably held to have that tendency. We do not intend now to decide that he must answer every question which he has been asked, but only that he must answer the questions subject to his having a right to object to any particular question on a reasonable ground that his answer might tend to criminate him.

COTTON, L.J.:—

I am of the same opinion, and on the same grounds. There is but little for me to add. As I understand it, Mr. *Horton Smith's* contention was this, that a witness on being called may at the very first question which is asked him, at once put down his foot and

C. A. 1882 *Ex parte* REYNOLDS. *In re* REYNOLDS. Cotton, L.J.

say, "I refuse to answer that question, because it may tend to criminate me," although nothing is stated by him and there are no facts appearing in the case which would render that result even possible. In my opinion that would be a most monstrous conclusion. I will say no more than that I think the rule is correctly laid down in *Reg.* v. *Boyes* (1), and to that decision I adhere.

As regards the other point, I am satisfied, as the Registrar seems to have been, that the witness's objection to answer was not a genuine objection on the ground that it would tend to criminate him, and that there was some other reason for his saying, "You will get nothing out of me."

I think, therefore, that the order was right. Of course we do not decide that if he objects to answer any question as to which there is a reasonable probability that the answer would tend to criminate him, he is bound to answer. The Court will consider any such objection if and when it is taken by him.

LINDLEY, L.J.:—

I am of the same opinion. The order appealed from was made because the witness declined to answer anything at all.

The effect of the examination satisfies me that his objection was not taken *bonâ fide* for his own protection. The tone of his answers satisfies me that he was not considering his own protection, but that he was considering how he could prevent those who are interested in upsetting the voluntary settlement from succeeding in doing so. That was what was passing in his mind, and not any danger of a criminal proceeding.

Now, twenty years ago the question how far the oath of a witness is conclusive on this point was decided by the Court of Queen's Bench, and that decision has never been disturbed since. There were differences of opinion on the point before that decision; but to the rule there laid down I adhere, and, indeed, I have never since heard it questioned. I have always thought that the rule was perfectly well settled, and I think we ought not now to disturb it.

If when further questions are put to the witness he declines to answer, and the Judge or presiding Registrar is of opinion that he

(1) 1 B. & S. 311.

is declining to answer *bonâ fide* for his own protection, and that there is any appreciable danger to him, he will be entitled to the benefit of silence; otherwise he will have to answer the questions put to him.

This appeal must therefore be dismissed with costs.

Solicitors for Appellant: *G. S. & H. Brandon.*
Solicitors for Trustee: *Bellamy, Strong & Baker.*

W. L. C.

TURNER *v.* HANCOCK.

[1879 T. 249.]

Practice—Appeal for Costs—Costs of Trustee—Judicature Act, 1873, *s.* 49—*Rules of Court*, 1875, *Order* LV.

The right of a trustee to his costs, like that of a mortgagee, is a matter of contract, and is not in the discretion of the Judge; although he may be deprived of them for misconduct

Therefore the costs of a trustee are not within sect. 49 of the *Judicature Act*, 1873, and an appeal may be brought from a decision in respect of them.

Cotterell v. *Stratton* (1) and *Farrow* v. *Austin* (2) followed. *In re Hoskins* (3) disapproved.

The mere fact that a trustee denies that he is indebted to the estate, and on taking the accounts turns out to be indebted, is no reason for depriving him of his costs.

THE action in this case was brought for the purpose of carrying into effect the trusts of a voluntary settlement, dated the 31st of August, 1872, and made by one of the Plaintiffs, *Charles Turner*, in favour of his children. The Defendants were *W. Hancock* and *Clara Hancock*, the present trustees of the settlement. *W. Hancock*, the acting trustee, alleged that he had expended more money on account of the trust than he had received.

The trial took place before Vice-Chancellor *Bacon*, on the 1st of December, 1880, when his Lordship ordered that the trusts should be carried into effect, and directed an inquiry as to the

(1) Law Rep. 8 Ch. 295. (2) 18 Ch. D. 58.
(3) 6 Ch. D. 281.

C. A. 1882

TURNER v. HANCOCK.

property, reserving all costs. The Chief Clerk's certificate found that £62 was due from the Defendant *W. Hancock*.

When the action came on for further consideration, the Vice-Chancellor refused to allow *W. Hancock* his costs. *W. Hancock* appealed from this order.

Horton Smith, Q.C., and *Grosvenor Woods*, for the Appellant.

Higgins, Q.C., and *Davenport*, for the Plaintiff, took the preliminary objection that this was an appeal for costs. The costs of trustees no less than of other parties, are in the discretion of the Court. Therefore by the 49th section of the *Judicature Act*, 1873, there can be no appeal without the special leave of the Judge, which had not been applied for in this case. Order LV., only excepts the costs of a trustee who has a claim upon a particular estate or fund, which refers to the ordinary costs of administration. The costs of litigation are still left within the discretion of the Judge. This has been expressly decided in *In re Hoskins* (1); following *Taylor* v. *Dowlen* (2), which was before the *Judicature Act*. *Farrow* v. *Austin* (3) is distinguishable.

JESSEL, M.R.:—

It is clear, in my opinion, that this is a case in which an appeal as to costs is allowable. The only excuse for the objection to the appeal is the recent case of *In re Hoskins*. In *Cotterell* v. *Stratton* (4) the claim of trustees for costs is rightly put on the same footing as that of mortgagees. In that case Lord *Selborne* says (5): "The right of a mortgagee in a suit for redemption or foreclosure to his general costs of suit, unless he has forfeited them by some improper defence, or other misconduct, is well established, and does not rest upon the exercise of that discretion of the Court, which in litigious causes is generally not subject to review. The contract between the mortgagor and mortgagee, as it is understood in this Court, makes the mortgage a security not only for principal and interest, and such ordinary charges and

(1) 6 Ch. D. 281.
(2) Law Rep. 4 Ch. 697.
(3) 18 Ch. D. 58.
(4) Law Rep. 8 Ch. 295.
(5) Law Rep. 8 Ch. 302.

expenses as are usually provided for by the instrument creating the security, but also for the costs properly incident to a suit for foreclosure or redemption. In like manner the contract between the author of a trust and his trustees, entitles the trustees, as between themselves and their *cestuis que trust*, to receive out of the trust estate all their proper costs incident to the execution of the trust. These rights resting substantially upon contract can only be lost or curtailed by such inequitable conduct on the part of a mortgagee or trustee as may amount to a violation or culpable neglect of his duty under the contract. Any departure from these principles in the general course of the administration of justice in this Court would tend to destroy, or at least very materially to shake and impair the security of mortgage transactions and the safety of trustees. In fact, such a departure instead of being beneficial to those who may have occasion to borrow money on security, or to repose confidence as to property in their friends or neighbours, would, in the result, throw the former class of persons into the hands of those who indemnify themselves against extraordinary risks by extraordinary exactions, and would deprive the latter class of the assistance of all who cannot afford, or are not inclined, to bestow upon the affairs of other persons their money as well as their trouble and time."

It is not the course of the Court in modern times to discourage persons from becoming trustees by inflicting costs upon them if they have done their duty, or even if they have committed an innocent breach of trust. The earlier cases had the effect of frightening wise and honest people from undertaking trusts, and there was a danger of trusts falling into the hands of unscrupulous persons who might undertake them for the sake of getting something by them.

But it is said that *In re Hoskins* (1) is to a different effect. In that case Lord Justice *James* is reported to have said, "The present is not a case where the appellant is *ex debito justitiæ* entitled to costs; the costs of a trustee being subject to the discretion of the Court." If we have to choose between the authority of Lord *Selborne* and Lord Justice *James*, I should be inclined to follow Lord *Selborne's* decision. But I go further, for

(1) 6 Ch. D. 281, 283.

C. A. 1882 TURNER v. HANCOCK. Jessel, M.R.

I think it was not in the power of the Court in *In re Hoskins* (1) to overrule the previous authorities; therefore I must take the decision in that case to have been founded on a mistaken view of the law and to be subject to review.

That being so, we come to the words of Order LV., which are as follows: "Subject to the provisions of the Act the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court." That does not include the costs of a mortgagee or trustee, which I have shewn not to be in the discretion of the Court. *Farrow* v. *Austin* (2) is directly in point. I think, therefore, that this appeal must be allowed to proceed.

COTTON, L.J.:—

I am of the same opinion. The 49th section of the *Judicature Act*, 1873, says that no order for costs only, which by law are left to the discretion of the Court, shall be subject to any appeal except by leave of the Court or Judge making such order. There is no doubt that the Court has power to deprive a trustee of his costs, but it only does so if something has occurred to deprive the trustee of his right to take them out of the fund, which is part of the contract under which he undertakes the trust. It has been attempted to confine that right to costs which are not costs of litigation; but *Cotterell* v. *Stratton* (3) directly applies on this point. In that case a mortgagee was deprived by the Vice-Chancellor of his costs of the suit, and an appeal was allowed, shewing that the rule applied not only to costs incurred without litigation but also to the costs of a suit—a trustee and a mortgagee being put upon the same footing in this respect—both kinds of costs being in fact a matter of contract. Under these circumstances I think it is clear that a trustee's costs cannot be said to be within the discretion of the Court, and are excepted out of the section of the Act which I have read.

The only difficulty in the case has been raised by *In re Hoskins*, but whether the Judges in that case considered that the trustee had forfeited his costs by a denial of the trust, or for whatever reasons they decided it, I think we ought to follow the previous cases and *Farrow* v. *Austin*.

(1) 6 Ch. D. 281. (2) 18 Ch. D. 58. (3) Law Rep. 8 Ch. 295.

LINDLEY, L.J.:—

I am of the same opinion. I think that a trustee is entitled to his costs unless his case can be brought within Order LV.; in other words, costs of that kind are not costs which are left to the discretion of the Judge by the rule; for if not so left under Order LV. they are not costs under the 49th section of the Act. I should have certainly held so on principle, but I confess that I am puzzled by *In re Hoskins* (1). I cannot understand that case; but I think we are bound by the earlier authorities, and ought to follow them in the present case.

COTTON, L.J.:—

I am inclined to think that if a trustee is deprived of his costs upon proceedings taken under the *Trustee Relief Act*, an appeal might be brought.

JESSEL, M.R.:—

I think so too.

The appeal was then heard on the merits.

Horton Smith, Q.C., and *Grosvenor Woods* contended that the trustee had done nothing for which he ought to be deprived of his costs.

Higgins, Q.C., and *Davenport*, for the Plaintiff, supported the judgment of the Vice-Chancellor.

JESSEL, M.R.:—

I cannot see any good ground for depriving the trustee of his costs. The only ground alleged is that before the suit he had received moneys belonging to the trust, and in the progress of the suit had received more, and having paid considerable sums on account of the trust he denied that he was indebted to the trust. It turned out when the accounts were taken that he was indebted to the trust in about £62. That is no ground for depriving him

(1) 6 Ch. D. 281.

C. A. 1882 TURNER v. HANCOCK.

of his costs in the absence of any misconduct; therefore the judgment of the Vice-Chancellor must be reversed on this point.

COTTON and LINDLEY, L.JJ., concurred.

Solicitors: *G. R. Burn; G. S. & H. Brandon.*

M. W.

C. A. 1882 *April* 20; *May* 4.

Ex parte PITT. *In re* GOSLING.

Close of Bankruptcy—Bankrupt without Assets—Power of Court to reopen Proceedings—Rights of new Creditors—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 47, 54, 71.

The Court has power under s. 47 of the *Bankruptcy Act*, 1869, to make an order closing a bankruptcy in a case where it does not appear that the bankrupt has any assets.

After an order has been made closing a bankruptcy, the Court has, under s. 71, power to reopen it.

But such an order ought not to be made without notice to the creditors of the bankrupt (if any) whose debts have been contracted after the adjudication, nor without letting them in to prove as creditors against any property of the bankrupt acquired by him after the date of the order to close the bankruptcy.

THIS was an appeal from a decision of Mr. Registrar *Hazlitt*, acting as Chief Judge in Bankruptcy.

The bankrupt, whose real name was *Charles Tueski*, carried on business as a tobacconist in *Cloak Lane*, in the city of *London*, under the name of *Gosling*. On the 27th of February, 1879, he committed an act of bankruptcy by absconding, and on the 11th of March, 1879, he was adjudicated bankrupt under the name of *Gosling*, by which name only he was known to his creditors. On the 26th of March trustees and a committee of inspection were appointed. Only three creditors proved in the bankruptcy before the proceedings were closed, as will be presently mentioned, their united claims amounting to about £527. Neither the bankrupt nor any assets could be found, and it being apparently useless to continue the bankruptcy proceedings they were closed by an order dated the 18th of February, 1881. This order was made on the application of the trustees and inspectors, and after notice to

all the creditors and without the dissent of any of them. No order of discharge was granted to the bankrupt.

After the adjudication the bankrupt went to *Eastbourne* and took a house and shop there, and commenced business as a tobacconist under his real name of *Tueski*. He borrowed £200 from his wife's sister, Miss *Adams*, in order to commence this business, and he contracted trade debts at *Eastbourne* in his real name. Neither his sister-in-law nor his *Eastbourne* creditors knew that he had formerly traded in *London* under the name of *Gosling*, nor that he had been adjudicated a bankrupt under that name.

In August, 1881, the trustees discovered that the bankrupt was at *Eastbourne*, and on the 27th of August they seized his stock-in-trade and other property there. They applied to the Court of Bankruptcy to rescind the order of the 18th of February, 1881, and to reopen the bankruptcy, and on the 15th of September, 1881, an order was made reopening the bankruptcy, and directing that the proceedings under it should continue, notwithstanding the order of the 18th of February, 1881, by which they had been closed. This order was obtained without any advertisement, and without notice to those persons who had become creditors of the bankrupt after the adjudication.

After this order was made, the trustees sold the bankrupt's *Eastbourne* business and the stock-in-trade which he had there, and realized a considerable sum of money. More debts contracted by him before the adjudication were proved, and in March, 1882, the trustees applied to the Court for directions respecting the distribution of the money which they had realized, and for an order authorizing them to distribute those funds amongst the creditors whose debts were contracted before the adjudication, to the exclusion of those creditors whose debts were contracted after that time. By the direction of the Registrar notice of this application was given to Miss *Adams* and to Messrs. *Wills*, who were creditors in respect of the bankrupt's *Eastbourne* business, and to others of his *Eastbourne* creditors. The application was heard on the 14th of March, 1882, and the Registrar made the following order: "It is ordered that *Adèle Adams* and Messrs. *W. D. & H. O. Wills*, and all other persons with whom

C. A. 1882 *Ex parte* PITT. *In re* GOSLING.

the bankrupt in the name of *Charles Tueski* contracted debts subsequently to the date of the adjudication herein, and prior to the 27th day of August, 1881, shall be allowed to prove in the bankruptcy, and to receive out of the estate dividends upon the amounts of the debts so proved by them, in the same manner as if the said debts had been contracted before such adjudication."

From this order the trustees appealed.

Horton Smith, Q.C., and *J. E. Linklater*, for the Appellants:—

The order to reopen the bankruptcy proceedings having been made, all the property which the bankrupt had acquired since the original order closing the bankruptcy vested in the trustees: *Bankruptcy Act*, 1869, ss. 15, 17; and the new creditors, their debts having been contracted since the adjudication, are not entitled to prove in the bankruptcy: *Bankruptcy Act*, 1869, s. 31. An order to close a bankruptcy cannot properly be made under sect. 47 where the bankrupt has no assets. At any rate, the order reopening the proceedings was not appealed from in time, and cannot now be appealed from without leave.

[They were stopped by the Court.]

Finlay Knight, for Messrs. *Wills*:—

The new creditors had no notice of the bankruptcy, and the effect of discharging the order will be that the old creditors will get paid out of the proceeds of the goods which we have supplied, while we shall be paid nothing. The effect of the order to close the proceedings was to free the bankrupt's after-acquired property from the claims of the creditors who were entitled to prove in the bankruptcy, except so far as the Court should give them leave to proceed against that property, and that is to be subject to the rights of any new creditors: *Bankruptcy Act*, 1869, ss. 47, 54 (1). At any rate the order reopening the proceedings ought

(1) Sect. 47: "When the whole property of the bankrupt has been realized for the benefit of his creditors, or so much thereof as can, in the joint opinion of the trustee and committee of inspection, be realized without needlessly protracting the bankruptcy, or a composition or arrangement has been completed, the trustee shall make a report accordingly to the Court, and the Court, if satisfied that the whole of the property of the bankrupt has been realized for the benefit of his creditors, or so much thereof as can be

not to have been made without notice to the new creditors, whose rights were seriously affected by it, and it should have been made subject to their rights. The Registrar's order may be technically wrong, but it works out substantial justice.

Herbert Reed, for Miss *Adams*.

May 4. LINDLEY, L.J., delivered the judgment of the Court (*Jessel*, M.R., and *Cotton* and *Lindley*, L.JJ.) After stating the facts as above, he continued:—

The appeal involves a consideration of the validity and effect,

---

realized without needlessly protracting the bankruptcy, or that a composition or arrangement has been completed, shall make an order that the bankruptcy has closed, and the bankruptcy shall be deemed to have closed at and after the date of such order.

"A copy of the order closing the bankruptcy may be published in the *London Gazette*, and the production of a copy of such *Gazette* containing a copy of the order shall be conclusive evidence of the order having been made, and of the date and contents thereof."

Sect. 54. "Where a person who has been made bankrupt has not obtained his discharge, then, from and after the close of his bankruptcy, the following consequences shall ensue:

(1) "No portion of a debt provable under the bankruptcy shall be enforced against the property of the person so made bankrupt until the expiration of three years from the close of the bankruptcy, and during that time, if he pay to his creditors such additional sum as will, with the dividend paid out of his property during the bankruptcy, make up ten shillings in the pound, he shall be entitled to an order of discharge in the same manner as if a dividend of ten shillings in the pound had originally been paid out of his property:

(2) "At the expiration of a period of three years from the close of the bankruptcy, if the debtor made bankrupt has not obtained an order of discharge, any balance remaining unpaid in respect of any debt proved in such bankruptcy (but without interest in the meantime) shall be deemed to be a subsisting debt in the nature of a judgment debt, and, subject to the rights of any persons who have become creditors of the debtor since the close of his bankruptcy, may be enforced against any property of the debtor, with the sanction of the Court which adjudicated such debtor a bankrupt, or of the Court having jurisdiction in bankruptcy in the place where the property is situated, but to the extent only, and at the time and in manner directed by such Court, and after giving such notice and doing such acts as may be prescribed in that behalf."

Sect. 71 provides that, "Every Court having jurisdiction in bankruptcy under this Act may review, rescind, or vary any order made by it in pursuance of this Act."

C. A. 1882

Ex parte PITT. *In re* GOSLING.

first, of the order closing the bankruptcy; and, secondly, of the order reopening it.

Sect. 47 of the *Bankruptcy Act* does not in terms apply to a case in which there are no assets at all. In terms it applies only to cases in which there are assets, and in which the whole of them, or so much of them as can be realized in a reasonable time, have been realized. But, considering that the object of closing the bankruptcy is to put an end to useless proceedings, and to enable the trustee to obtain his release, and considering also that orders closing bankruptcies where there have been no assets have been frequently made, for instance, in *Ex parte Lancaster Banking Corporation* (1), and have never been challenged, we do not feel called upon to put on the section a narrow literal construction and to hold such orders to be *ultrà vires* and of no effect.

We proceed thereupon to consider this case upon the assumption that the order of the 18th of February, 1881, closing the bankruptcy, was a valid order.

Assuming this order to be valid, the trustees under the bankruptcy could not, whilst the order was in force, claim property acquired by the bankrupt after the date of the order. Such property belonged to the bankrupt, although he was undischarged, and was liable to execution at the suit of any creditor who obtained judgment against him. This follows from sect. 54, and from *In re Pettit's Estate* (2) and *Ex parte Lancaster Banking Corporation.* For three years after the order closing the bankruptcy creditors whose debts accrued before the bankruptcy cannot reach the property acquired by the bankrupt after that order, but, after the expiration of three years, they can do so, with the sanction of the Court of Bankruptcy, but subject to the rights of the creditors who have become such since the close of the bankruptcy. On the other hand, creditors whose debts accrued after the bankruptcy, and who could not, therefore, prove under it, can sue the bankrupt, and, after obtaining judgment against him, can issue execution against the property acquired by him after his bankruptcy was closed. The power of the Court to reopen the bankruptcy after the order closing it is conferred by

(1) 10 Ch. D. 776. (2) 1 Ch. D. 478.

sect. 71 of the Act. Now, having regard to the respective rights of the old and new creditors as already explained, it appears to us that the order of the 15th of September, 1881, reopening the bankruptcy, and, in effect, vesting in the trustees all the property of the bankrupt acquired since his bankruptcy was closed, ought not to have been made without notice to Miss *Adams* and the *Eastbourne* creditors, nor without letting them in to prove as creditors against the property of the bankrupt acquired since the close of the bankruptcy. It is true that that order has not been appealed from, and that the time for appealing from it without special leave has expired. But in a case of this description we should, if necessary, give leave to appeal from it. The order actually under appeal was, however, made by a Court which was bound to treat the order of September, 1881, reopening the bankruptcy, as unimpeachable, and, so long as that order stands, the order appealed from cannot be supported. If the order reopening the bankruptcy stands in its present form, the property acquired by the bankrupt since February, 1881, as well as that acquired by him before that date, will vest in the trustee for the benefit of those creditors who are entitled to prove in the bankruptcy. Miss *Adams* and the *Eastbourne* creditors, whose debts were contracted after the bankruptcy, could not so prove, and the order admitting them to prove is wrong. But, although that order is technically wrong, it appears to us substantially right, and if we were now to discharge it, and to treat the order reopening the bankruptcy as under appeal, we should see no difficulty in varying that order, by making it conditional on the trustees paying to Miss *Adams* and the *Eastbourne* creditors, out of the property acquired by the bankrupt since the 18th of February, 1881, a dividend on their debts, equal to that which may be received by the creditors entitled to prove under the bankruptcy. To work out such an order it would be necessary to ascertain what parts (if any) of the bankrupt's property realized by the trustees were acquired by him before, and what parts were acquired by him after, the 18th of February, 1881. Judging from the evidence on the file, and having regard to the fact that the bankrupt has again absconded, we doubt whether an inquiry with the above object would be of any practical use to the old creditors.

C. A. 1882

Ex parte PITT. *In re* GOSLING.

The property sold by the trustees, consisting of the *Eastbourne* business and the goodwill and stock-in-trade thereof, was to a considerable extent acquired by means of money borrowed by the bankrupt from his friends since his adjudication, and by means of his own exertions and credit obtained by him since he went to *Eastbourne*. At the same time, some of the property sold by the trustees probably belonged to the bankrupt before he was adjudicated bankrupt, or was purchased with the proceeds of such property. How much was attributable to one of these sources, and how much to the other, it would probably be impossible now to discover.

It appears to us, therefore, that it is in the interest of all parties to allow the order appealed against to stand, and, by consent, to dismiss this appeal, and to let all parties have their costs out of the estate. If, however, this suggestion is not acceded to, we will give the Respondents leave to appeal against the order reopening the bankruptcy, and then make one order on both appeals, so as to give each class of creditors their strict rights.

Horton Smith, on behalf of the trustees, acceded to the suggestion of the Court.

Solicitors for trustees: *Nicholls & Grant.*
Solicitors for creditors: *Piesse & Son; Goldberg & Langdon.*

W. L. C.

Ex parte ROSENTHAL. *In re* DICKINSON.

C. A.
1882
C. J. B.
March 20, 27.
C. A.
May 4.

Bankruptcy—Appeal from County Court—Time—Payment of Deposit—Formal Defect or Irregularity—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 71, 82—*Bankruptcy Rules*, 1870, *r.* 145—*Bankruptcy Rules, Nov.* 1878, *r.* 2.

Rule 2 of November, 1878, has not altered the requirement of rule 145 of 1870, that the deposit on an appeal from a County Court shall be paid "at or before the time of entering" the appeal:

Semble, however, that the payment would be in time if it was made at the earliest possible moment after the entry of the appeal.

An appeal was entered on the 17th of February, but the deposit was not paid till the 6th of March:—

Held, that this was not a formal defect or an irregularity which could be cured under the power given to the Court by sect. 82, and that the appeal could not be entertained.

Having regard to rule 2 of November, 1878, the proper practice now is for the Registrar, before entering an appeal, to give a direction to the *Bank of England* to receive the deposit on the appeal, and, after receiving a certificate from the bank that the money has been paid, to enter the appeal.

AN order was made by the County Court at *Newcastle-on-Tyne* on the 28th of January, 1882. Notice of appeal was given, and the appeal was entered with the Registrar of Appeals on the 17th of February, but the deposit on the appeal was not paid into the *Bank of England* until the 6th of March (1). The appeal came on to be heard before the Chief Judge on the 20th and 27th of March, 1882.

Winslow, Q.C., and *Joel*, for the Appellant.

(1) Rule 145 of the Bankruptcy Rules, 1870, provides that "At or before the time of entering an appeal, the party intending to appeal shall deposit with the Registrar of Appeals such sum, not being less than ten pounds, and not exceeding forty pounds, as the Court appealed from shall direct, to satisfy, so far as the same may extend, any costs that the Appellant may be ordered to pay, and in the absence of any such direction, the sum deposited shall be twenty pounds."

Rule 2 of the Rules of the 22nd of November, 1878, provides that "The sum to be deposited on appeal in pursuance of rule 145 of the said General Rules, shall in future be paid by the party intending to appeal into the *Bank of England*, to the credit of the account, entitled, 'The Account of the Accountant in Bankruptcy.'"

C. A. 1882 *Ex parte* ROSENTHAL. *In re* DICKINSON.

Finlay Knight, and *Creed*, for the Respondent, objected that the appeal could not be heard, on the ground that the deposit had not been paid in time. It was not paid "at or before" the time of entering the appeal.

Winslow, Q.C., and *Joel*, for the Appellant:—

Rule 145 no longer regulates the practice of the Court.

Rule 2 of the 22nd of November, 1878, has taken its place, and that rule fixes no limit of time within which the payment is to be made. Since the Order of the 22nd of November, 1878, rule 145 has never been literally complied with; but the deposit, as in this instance, has always been paid, sooner or later, and thus the object of the rule is secured, which was to provide a fund from which, if the appeal should fail, the costs might be paid. The objection is, at the most, a merely technical one, and ought not to prevail. Even if the rule of November, 1878, had limited a time, which it does not, an error of this kind could be cured by an exercise by the Court of its jurisdiction under sect. 82 (1) of the *Bankruptcy Act*, 1869.

BACON, C.J.:—

I believe there is no one more reluctant than I am to adhere too closely to the rules and orders of the Court where the failure to comply with them has been purely formal and technical. Under such circumstances, I am always ready to avail myself of the powers given by the 82nd section. But I have no power to repeal any of these rules. If the Court of Appeal has power to do so, they will exercise that power, and no doubt they are right in whatever they do. Into the question whether the rules are in themselves right or wrong, I have no right to inquire, but I must say I hardly know of a more wholesome rule than this, by which

(1) Sect. 71 provides that "No appeal shall be entertained under this Act except in conformity to such rules of Court as may for the time being be in force in relation to such appeal."

Sect. 82: "No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the Court before which an objection is made to such proceeding is of opinion that substantial injustice has been caused by such defect or irregularity, and that such injustice cannot be remedied by any order of such Court."

the parties are required to pay the deposit at the time of entering the appeal. It is right that the party appealed against should know when, where, and how he is summoned to answer, and if I were to allow this appeal to be heard, I should be practically enlarging the period of twenty-one days within which an appeal must be brought. It may well be that the rule was adopted in order to prevent an Appellant from first lodging an appeal and then going round with a hat to collect the £20 required by the statute to be deposited. The rule is perfectly clear and distinct. It requires the Appellant "at or before the time of entering an appeal" to make the deposit. That is the condition which the law requires to be fulfilled before the Appellant can summon his opponent before the Court.

The other rule, that of the 22nd of November, 1878, does not impair the former in the slightest degree. It orders that the sum to be deposited shall be paid into the *Bank of England*. It does not say anything about repealing or altering the 145th rule of 1870. The Appellant goes to the Registrar; the Registrar furnishes him with a form which gives him the means of complying strictly and literally with the rule. He pays the money into the bank, and having obtained the bank's certificate, brings it back to the Registrar, who thereupon enters the appeal. In effect the Registrar says, "Bring me the receipt from the bank and I will enter the appeal." It has been submitted that this was an inadvertence on the part of the solicitor, but I cannot hear of such an excuse from a professional man. It was his duty to have paid the money, and he must have known that this was a substantial part of his duty.

I am compelled, therefore, to allow this objection, and to say that, the appeal having been lodged on the 17th of February, and the deposit not having been paid until the 6th of March, long after the expiration of the twenty-one days prescribed by the statute, the requirements of the rule have not been complied with, and I am not at liberty to hear the appeal.

J. B. D.

C. A.

From this decision the Appellant appealed to the Court of Appeal.

C. A.

1882

Ex parte ROSENTHAL. *In re* DICKINSON.

The appeal was heard on the 4th of May, 1882.

Winslow, Q.C., *Rosenthal*, and *Joel*, for the Appellant:—

Though rule 2 of November, 1878, has not expressly altered the time limited by rule 145 for paying the deposit, it has done so inferentially. The *Bank of England* will not take the money without a direction or certificate from the Registrar, and the Registrar will not give the certificate until the appeal has been entered with him. Therefore it is impossible to pay the deposit "at or before" the entry of the appeal. That, at any rate, was the practice before the decision of the Chief Judge in the present case. Since that decision the practice has been altered. Notice has been given by the Court of Bankruptcy that in future the Registrar will give his direction to the bank to receive the deposit before he enters the appeal, and will enter the appeal on receiving from the bank a certificate that the money has been paid. The object of the deposit is only to secure the payment of the Respondent's costs.

[JESSEL, M.R.:—There is another object—to secure the *bona fides* of the appeal.]

Sect. 82 enables the Court to dispense with the provisions of the rules, and to cure an irregularity or formal defect. The rules are only directory. Sect. 71 gives the Court of Appeal an original jurisdiction in bankruptcy matters.

Finlay Knight, and *Creed*, for the Respondent, were not heard.

JESSEL, M.R.:—

I have endeavoured to find a way of escaping from the provisions of the Act and the rules, but I have failed to do so. Sect. 71 is plain. It says that "no appeal shall be entertained under this Act except in conformity to such rules of Court as may for the time being be in force in relation to such appeal." There is a rule, rule 145, which provides that the deposit shall be paid to the Registrar "at or before" the time of entering the appeal, and rule 2 of November, 1878, provides that the deposit, instead of being paid to the Registrar, shall be paid to the *Bank of England*. But it makes no alteration in the provision of rule 145

that the deposit shall be paid "at or before" the entry of the appeal. The proper course to adopt is that which, it appears, has been adopted in the Court of Bankruptcy since this decision of the Chief Judge, viz., for the Registrar to give a direction to the bank to receive the money before he enters the appeal, and to enter the appeal after he receives a certificate from the bank that the payment has been made. There is no possibility of saying in the present case that the rule has been complied with. But it is suggested that sect. 82 enables us to cure the omission. That section, however, cannot repeal the provision of sect. 71; the two may well stand together. The omission to pay the money cannot properly be called an irregularity; it is an omission of a serious kind. It is said that the practice in the Registrar's office may control the meaning of the rules. That cannot be so. If the practice was to enter the appeal too soon, it, being in direct contradiction of the rule, cannot affect its construction. And the entry being improper, it could give the Appellant no right as against the Respondent. It may be that, if the money had been paid at the earliest possible moment after the entry of the appeal, the Court might have held that the rule had been sufficiently complied with, construing the words "at or before" as equivalent to "about." But here the delay in making the payment was so great that by no fair extension of the meaning of the rule can we say that the money was paid in time. I am sorry to say that I think the decision was right.

LINDLEY and HOLKER, L.JJ., concurred.

Solicitor for Appellant: *A. E. Rosenthal.*

Solicitors for Respondent: *Pattison, Wigg, & Co.*, agents for *H. E. Richardson, Newcastle-on-Tyne.*

W. L. C.

C. A.
1882
Feb. 11.

In re SPARROW (A PERSON OF UNSOUND MIND).

Lunacy—Lunatic Tenant for Life—Application by Tenant in Tail, a Collateral, for Allowance—Next of Kin not consenting—Allowance sanctioned upon Terms—Charge on Inheritance—Protector of Settlement.

A lunatic, aged sixty-four, was tenant for life of certain real estates, of which his nephew, aged twenty-eight, was tenant in tail in remainder, producing a considerable yearly income. The nephew had been found heir-at-law and one of the next of kin of the lunatic.

The Court, upon the nephew's petition, directed an allowance of £500 per annum to be made to him out of the surplus income of the lunatic after providing for a yearly sum for the lunatic's maintenance, in spite of the opposition of some of the next of kin, upon the terms of the Petitioner charging the estate with the repayment of the sums received in respect of such allowance, the Lords Justices consenting as protector of the settlement to the Petitioner barring his estate tail, but only so far as to let in the charge.

THIS was a petition presented by *Basil J. H. Sparrow*, the nephew of *Henry Weare Sparrow*, the lunatic, for an allowance out of the surplus income of the lunatic.

The lunatic, who was sixty-four years of age, and unmarried, and had been since 1840 of unsound mind, and under the care of the Court of Lunacy since 1842, was tenant for life of certain estates in *Essex*, *Suffolk*, and elsewhere, devised by the will of *J. G. Sparrow*, the paternal grandfather of the Petitioner, producing about £2800 per annum, of which the Petitioner was tenant in tail in remainder. There was also standing in Court a sum of about £38,786 Consols, or thereabouts, arising from accumulations of principal and income to which the lunatic was absolutely entitled, and also a sum in cash.

The allowance made to the lunatic amounted to £876 12*s.* per annum, having been lately increased from £600.

By a report of one of the Masters in the said lunacy the Petitioner had been found the heir-at-law of the lunatic, and also one of his next of kin. The other next of kin, as found by the report, were a brother and sister of the lunatic and two

sisters of the half-blood, and nine nephews and nieces of the whole blood.

The Petitioner was a clergyman aged twenty-eight years, and his whole private income consisted of £100 per annum under the will of his father.

He now prayed that an allowance might be made to him out of the net income of the said estates during the life of the lunatic, or until further order (after providing for the payment of the said yearly sum of £876 12*s.*), of £500 per annum, or such other sum as the Court should think reasonable, having regard to his social position and prospects.

Some of the next of kin, including the tenant in tail in remainder expectant on the death of the Petitioner without issue, did not consent to the application.

J. Pearson, Q.C., and *Townsend*, for the Petitioner :—

Similar orders to that now asked have been made: *Ex parte Whitbread* (1); *In re Blair* (2). It appears from the latter case that Lord *Eldon* did eventually, in the former, accede to the petition. They also cited *In re Croft* (3).

[JESSEL, M.R. :—Has an allowance ever been made to a collateral when the next of kin oppose? It is common enough to give to children of the lunatic.]

In *Ex parte Whitbread* it would appear that there was opposition.

[JESSEL, M.R. :—No. On p. 99 it appears that the Master's report giving the allowance to all the next of kin was assented to. The petition was to obtain a larger share for the petitioner, and that share was the only thing in dispute. In *Pope* on Lunacy (4) these applications are stated to be made with consent.]

The case of *Ex parte Whitbread* at any rate shews the principle on which Lord *Eldon* thought the Court should act, that is, it should see what the lunatic would himself reasonably do if he were sane, and it is not unnatural to suppose that the owner of landed estates would be willing to make his nephew who is to

(1) 2 Mer. 99.
(2) 1 My. & Cr. 300.
(3) 32 L. J. (Ch.) 481.
(4) Page 141.

C. A. 1882

In re SPARROW (A PERSON OF UNSOUND MIND).

succeed to them an allowance so as to prepare him for the position which will be his.

Cookson, Q.C., and *C. Church*, for some of the next of kin, did not oppose, suggesting, however, that the Petitioner should insure his life against the life of the lunatic, when, in the event of his predeceasing the lunatic, the money would be recouped to the lunatic's personal estate.

W. Barber, Q.C., and *D. Sturges*, for the non-assenting next of kin, objected that there was no authority for an application like the present; in no case had the Court made an allowance—which was in fact a giving away of the lunatic's property—to a collateral relative of the lunatic. In *In re Blair* (1) the circumstances were special, but Lord *Cottenham* said, while granting it, that the practice of making allowances should be narrowed, and that the Court ought to act with great jealousy and caution.

They suggested that if any allowance should be made to him it should be taken into account on the division of the lunatic's personal estate at his death.

[JESSEL, M.R.:—No; he may not survive. He can charge the amount upon the estate. I can consent as protector to his barring his estate tail to the extent of letting in the charge.]

The next of kin cannot consent merely to his charging the estate; he should at any rate also effect an insurance.

JESSEL, M.R., sanctioned the allowance to be made out of the available surplus income of the lunatic. His Lordship declined to order any insurance to be effected, but (the Petitioner by his counsel consenting) ordered that the repayment to the lunatic's estate of the sums of money received by the Petitioner in respect of the yearly allowance should be secured without interest during the lunatic's life, and with interest at 4 per cent. as from the lunatic's death by a charge on the estates of which the Petitioner was tenant in tail; the Lords Justices consenting as protector of the settlement to the Petitioner barring his estate tail, for the

(1) 1 My. & Cr. 300.

C. A.
1882
In re SPARROW (A PERSON OF UNSOUND MIND).

purpose and to the extent only of letting in the charge, a proper disentailing assurance by the Petitioner to be settled and approved of by the Master.

Solicitors for Petitioner: *Beaumont & Warren.*

Solicitors for Next of Kin: *Prior, Bigg, & Co.; Hyde, Tandy, & Mahon.*

M. W.

WILKINSON *v.* HULL, &c., RAILWAY AND DOCK COMPANY.

C. A.
1882
KAY, J.
Feb. 17.
C. A.
March 9, 10.

[1882 W. 460.]

Railway Company—Accommodation Works—Compulsory Powers—Railways Clauses Consolidation Act, 1845 (8 *Vict. c.* 20), *ss.* 15, 16, 68 [*Revised Ed. Statutes, vol. ix. pp.* 633, 642]—*Discretion of Company as to the most convenient Mode of doing the Works.*

Lands required by a railway company for accommodation works are lands required for the purposes of "the undertaking" or "of the railway."

Every work which a railway company is empowered to do, not merely what it is compelled to do, is a purpose of the undertaking.

The word "necessary" in the 68th section of the *Railways Clauses Consolidation Act*, 1845, refers to the obligation to make good the interruption, and does not confine the company to any particular mode of doing the works. Where there are several modes of doing the works, the company, acting under the advice of their engineer, are the sole judges which mode should be adopted; but if they do not act *bonâ fide* the Court will interfere.

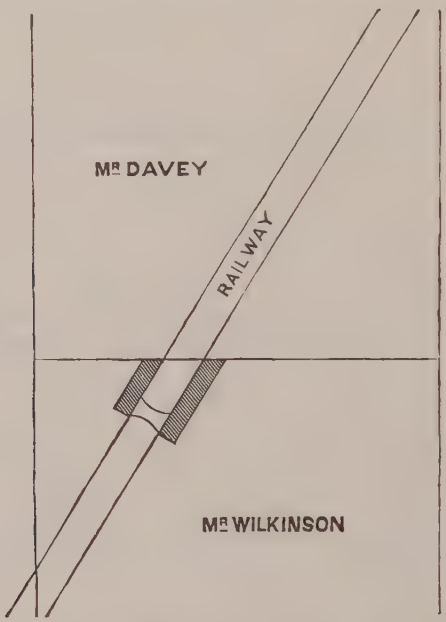
A railway company having intersected the lands of two adjoining landowners, *A.* and *B.*, by an embankment, proposed to connect the severed portions of *A.'s* land by an arch through the embankment, and to give *B.* a right of way through the same arch, which they proposed to connect with his land by an occupation road carried through *A.'s* land. The strip of *A.'s* land proposed to be taken for this road was included in the lands delineated. *A.* objected to this arrangement as being beyond the powers of the company:—

Held (reversing the decision of *Kay*, J.), that the company had power to take the strip of land compulsorily for the proposed purpose.

THE Plaintiff and Mr. *Davey* were the owners of two adjoining fields near *Hull*, across which, on an embankment, the *Hull, Barnsley, and West Riding Junction Railway* was intended to

C. A. 1882 — WILKINSON v. HULL, &c., RAILWAY AND DOCK COMPANY.

pass diagonally, as shewn in the plan. The company was established in 1880 by the statute 43 & 44 Vict. c. cxcix., which incorporated the *Lands Clauses Consolidation Act* and *Railways Clauses Consolidation Act*, 1845. It was originally intended to give each of the two landowners a separate occupation bridge, or archway, under the embankment; but the company afterwards



proposed to place Mr. *Wilkinson's* bridge near the boundary of the two fields, and to take two small pieces of his land on each side in order to give Mr. *Davey* access to the bridge, and they accordingly served Mr. *Wilkinson* with notice to treat for these two pieces of land, being those shaded in the plan. Mr. *Wilkinson* brought an action to restrain the company from taking proceedings under their notice to treat, and moved, before Mr. Justice *Kay*, for an injunction accordingly.

The piece of land proposed to be taken was included in the lands delineated in the company's Act; by the 5th section of which the company were empowered "to take and use such of the lands delineated as might be required for the purposes of their undertaking." Affidavits were filed by the engineer of the

company in which he stated that the works proposed were, in his opinion, reasonable and proper accommodation works, and the mode in which it was proposed to make them was a reasonable, proper, and usual mode of making them: and further, that the said land was *bonâ fide* required for the purpose of the said works. He also stated that it would be impossible to construct an archway on Mr. *Davey's* land without either altering the level of the railway or lowering the road below the level of the ground, which would be attended with great expense, and in the latter case the road under the archway would be liable to be flooded by accumulations of water.

The motion was heard before Mr. Justice *Kay* on the 17th of February, 1882.

Ince, Q.C., and *Solomon*, for the Plaintiff.

Macnaghten, Q.C., and *Borthwick*, for the railway company.

KAY, J:—

This case involves a question of considerable interest and importance which I should certainly hesitate to decide upon an interlocutory motion if it were not that both parties desire me to do so, and that I have been much assisted by the very able argument on each side. [His Lordship then stated the facts of the case.] Of course the question is whether the company have power under their Act of Parliament to take those strips of land. I am told that their Act is in the usual form which was observed upon in *Lord Beauchamp* v. *Great Western Railway Company* (1), and that the same or equivalent words are in the special Act in this case; and therefore the question is whether these two additional strips of land on each side of the embankment of the railway which the company now propose to take are, within the meaning of the *Railways Clauses Consolidation Act*, "necessary for the purposes thereof," which, as Lord *Hatherley* says, may be taken as meaning either "for the purposes of the company," or "for the purposes of the Acts empowering the company." Now the question in that case came before the Court of Appeal in a

(1) Law Rep. 3 Ch. 745.

C. A. 1882 — WILKINSON v. HULL, &c., RAILWAY AND DOCK COMPANY. — Kay, J.

rather different form. [His Lordship then stated the facts of that case, observing that it was an application to the Court to treat a piece of land through which the railway company had made a road as superfluous land, because according to the argument the company could not have taken it compulsorily, and therefore it must be treated as superfluous land, and so belonged either to the adjoining landowner, or anybody who was entitled. Lord *Hatherley* said that this was not the simple case of actually taking a piece of land for the purpose of making the road, but it was the case of making a road over land which had been originally taken for the purpose of making an embankment. His Lordship then read the principal parts of the judgment in that case, observing that it was evident that the *Clerkenwell* trustees had land on the other side of the railway to which communication might be made by an archway, and that in the supposed case there would have to be a tunnel going lengthways under the line in the course of the old road, and that Lord Justice *Selwyn* seemed to agree in the decision. His Lordship then proceeded:—] I read that case as establishing these propositions. Making accommodation works is an act which the company are by the 68th section of the *Railways Clauses Consolidation Act*, 1845, compellable to do. If the only way of doing this is by taking the land of a third person, they may take that land under their compulsory powers. If there are two modes of doing them, one extremely inconvenient to the landowner and costly to the company, and another more convenient to the landowner and cheaper to the company, which latter mode involves taking land but the former does not, they may still take the land. But if there is a mode of making a communication which is more convenient to the landowner, but not equally convenient to the railway company, then they may not take land for the purpose of making another communication which is more convenient to them. And that seems to me, if I may venture to say so, a very sensible construction of the Act; because in that last case they are not taking land for the purposes of the Act, and are not taking land for anything which they are liable to do under the Act, but they are taking land for their own convenience, and for the purpose of enabling them to make a communication, not in the ordinary way, but in a way which will save their own pockets.

Now these are the principles of law, by which, as it seems to me, I am bound according to that decision, and which I must apply to this case. And what is it that the railway company are proposing to do here? In the case of land severed by an embankment, the obvious and most convenient mode to the landowner would be to make an archway. To give him a roundabout passage through another man's land by an archway not immediately communicating between the two severed portions of his land, cannot possibly be as convenient a mode of communication as to make an archway on his own land; and I think it is quite obvious, and I do not think it was at all denied, that the purpose of the railway company is, not to provide the landowner with a more convenient communication, or indeed with a communication equally convenient, but their real purpose and object is to escape an expense of £1000, and to do that which is cheaper and more convenient to themselves. Part of the argument addressed to me as to the possible inconveniences which might occur from a severance of small pieces of land, and so on, seems to me to be completely answered by the 93rd and 94th sections of the *Lands Clauses Consolidation Act*, which provide for the purchase of severed portions of land. [His Lordship read the sections.] So that in this very case the argument which was used that the railway company may be put to very considerable expense in making that which I will call the obvious communication, is not any argument against the view taken by Lord *Hatherley;* because the answer is that they are not compelled to make the archway, they may take the whole land, and having bought it they may sell it again, perhaps as improved land, and so realize the price which they paid.

Therefore I come, on the whole, to the conclusion that they are not compellable to make these approaches in this way; it is not the most convenient way for the owner of the portions of that land so severed, and the taking these slips of land therefore is not a taking for the purposes of the Act, but is a taking for the purposes of the company, to save them the expense of making the obvious and more convenient communication.

I accordingly repeat what Lord *Hatherley* intimates is the law, with which I respectfully say I entirely agree, that the company

C. A. 1882 WILKINSON v. HULL, &c., RAILWAY AND DOCK COMPANY.

has no power to take compulsorily land for the purposes of its own convenience, and therefore I must grant the injunction which has been asked for in this case.

C. M.

C. A.

From this order the Defendants appealed. The appeal was heard on the 9th of March, 1882. Before the hearing of the appeal an affidavit was filed by Mr. *Davey* in which he said that the plan proposed by the company would be more convenient to him than that proposed by the Plaintiff, and that he had no objection to it.

Macnaghten, Q.C., and *Borthwick*, for the Appellants:—

Under the *Railways Clauses Consolidation Act*, 1845, s. 68, we are compelled to make necessary communications for the benefit of lands the use of which is interrupted by our railway. We are doing what is necessary not merely something which it is economical to us to do, as in *Fenwick* v. *East London Railway Company* (1) and *Pugh* v. *Golden Valley Railway Company* (2). The making accommodation works is one of the "purposes of the Acts": *Lord Beauchamp* v. *Great Western Railway Company* (3). The company are the judges within reasonable limits as to the way in which their works can best be carried out, and the evidence here is strong that the mode which the company is adopting is the most reasonable way.

[They were then stopped by the Court.]

Ince, Q.C., and *Solomon*, for the Plaintiff:—

This case is within the principle of *Eversfield* v. *Mid-Sussex Railway Company* (4), which is that the company is not entitled to use its compulsory powers so as to carry out its works in the most economical way without regard to other considerations. There is a chain of cases, commencing with *Dodd* v. *Salisbury and Yeovil Railway Company* (5), establishing that a company cannot use its powers to accomplish a subsidiary object. *Vane* v. *Cockermouth, &c., Railway Company* (6) is an instance of

(1) Law Rep. 20 Eq. 544.
(2) 15 Ch. D. 330.
(3) Law Rep. 3 Ch. 745.
(4) 1 Giff. 153; 3 De G. & J. 286.
(5) 1 Giff. 158.
(6) 13 W. R. 1015.

this. Although the words of sect. 16 are very general, the company must shew that the works to be done are necessary for the purposes of the undertaking, otherwise the compulsory powers do not arise. In the present case the engineer does not certify that the proposed works are necessary, but only that they will cost the company less than if the arch was made through the other part of the embankment. That is not sufficient. The company have no right to inconvenience or injure landowners merely to save themselves expense: *Lord Beauchamp* v. *Great Western Railway Company* (1); *Pugh* v. *Golden Valley Railway Company* (2); *Reg.* v. *Wycombe Railway Company* (3); *Stockton and Darlington Railway Company* v. *Brown* (4).

JESSEL, M.R.:—

This is an appeal from a decision of Mr. Justice *Kay* with respect to the rights of a railway company to take land. The railway company gave notice to take two strips of land adjoining to their railway, which strips of land are within the limits of the land which they have power to take compulsorily for the purposes of their railway. The landowner objects and says, "You are going to take this land for the purpose of making a communication between the lands of an adjoining landowner, Mr. *Davey*, whose lands you have severed; you can make that communication otherwise by means of an arch on his land; you are not entitled to take my land, for it is not required for the purposes of your Act." That is the contention. It appears to me that when you look at the Act of Parliament that contention is not well founded. The real question is, whether taking the land for this purpose is taking the land for the purposes of the railway—for the purposes of the undertaking. Now, independently of the decisions, I should have come to the conclusion, from the words of the *Railways Clauses Consolidation Act* itself, that taking land for the purpose of making accommodation works, which the company was liable to make, or even had power to make, was a taking of land for the purposes of the undertaking and of the Act. The 16th section of that Act says, "subject to certain provisions, it

(1) Law Rep. 3 Ch. 745.
(2) 15 Ch. D. 330.
(3) Law Rep. 2 Q. B. 310.
(4) 9 H. L. C. 246.

C. A. 1882 WILKINSON v. HULL, &c., RAILWAY AND DOCK COMPANY. Jessel, M.R.

shall be lawful for the company, for the purpose of constructing the railway or the accommodation works connected therewith hereinafter mentioned, to execute any of the following works." There we find no distinction whatever between the railway itself and the accommodation works, they are classed together, and under the word "railway" has always been included all such works connected with the railway proper as the company have power to construct. As regards accommodation works, I do not find anything in the Act which negatives this, that the company may make a bargain, as they constantly do, with landowners as to the accommodation works they are to construct, but when we come to the 68th section there is a compulsion on the company to make certain accommodation works. Now what are they? The section says, "The company shall make and at all times thereafter shall maintain the following works for the accommodation of the owners and occupiers of land adjoining (that is to say), such and so many convenient gates, bridges, arches, culverts, and passages over, under, or by the sides of or leading to or from the railway as shall be necessary for the purpose of making good any interruptions caused by the railway to the use of the lands through which the railway shall be made." It appears plain to me from the language of the Act that the word "necessary" applies only to the making good interruptions, and supposing they can make good the interruptions in two or three ways, who is to choose? Clearly the company, that is, the company acting under the advice of their engineer. They are to choose which way the works are to be done. If the way proposed is not convenient to the landowner he can apply to the magistrate under the 69th clause; but assuming each way is convenient, that is, that they can put the arch in three different places, each of which would be convenient, the company has to choose. It appears to me, therefore, that on the construction of the Act itself the company must make such works as will connect the lands, and the company is to choose the mode of connection. If that is so, we have here a case in which a company says, "By taking a strip of land we shall do the thing in a convenient way," and the landowner, Mr. *Darey*, whose land has been intersected, does not object. Then it is convenient to him and necessary to make good the

interruption. Well, that being done, the railway engineer says this—and he is confirmed by Mr. *Davey*—"If we make it in the way suggested by the present Plaintiff, it will be very inconvenient indeed. We shall either have to alter the embankment at all events for a sixth of a mile, or we shall have to make a road at a lower level which will be apt to be flooded in rainy weather." Those are real inconveniences; one is a serious inconvenience to the railway company by compelling them to alter the level of their railway unnecessarily, and in the other a serious inconvenience to the landowner, Mr. *Davey*, by rendering the road liable to be flooded, and it appears to me we have the strongest evidence of *bona fides* on the part of the railway company when they say, "We prefer to take a piece of land of the Plaintiff's in this case to make the railway." If the only object of the company is to make good the interruption, and this is a convenient way of doing it, and the land is within the limits of their powers and can be taken compulsorily, how can we say they cannot take it, and that it is not a purpose of the Act or a purpose of the undertaking? It appears plainly it is a purpose of the undertaking even if there were not a decision on the subject. But there are two decisions which I think it necessary to refer to, not merely because they are binding on the Court, but because they lay down general principles which we ought to follow. The first is the *Stockton and Darlington Railway Company* v. *Brown* (1), and as I read that case the statement made by Lord *Cranworth* in his judgment is a statement of general law applicable to railway companies, and he decides the case in reference to that. He says (2): "Some general propositions admit of no doubt. In the first place, I think it clear that when the Legislature authorizes railway directors to take for the purposes of their undertaking any lands specially described in their Act, it constitutes them the sole judges as to whether they will or will not take those lands, provided only that they take them *bonâ fide* with the object of using them for the purposes authorized by the Legislature, and not for any sinister or collateral purpose." Then he goes on to say, "This is the construction to be put on all such legislative powers, whether the language of the Act is that the company

(1) 9 H. L. C. 246. (2) 9 H. L. C. 256.

C. A. 1882 WILKINSON v. HULL, &c., RAILWAY AND DOCK COMPANY. Jessel, M.R.

may take so much of the lands as is necessary for the undertaking, or so much as is required or is expedient to be taken, or simply (as in this case) that the company may take lands for the purposes of the undertaking. In such cases the Legislature, having provided what it considers sufficient means for securing adequate compensation to the owners of the land, leaves it to those interested in the undertaking to say to what extent it will be useful to them to exercise their statutable powers." In other words, it is simply this, that once established that it is a purpose of the undertaking, and the company is acting *bonâ fide*, the company is entitled to take the land. Lord *Campbell* says the same thing, though rather more shortly. He says (1): "If it had been proved that the company was acting *malâ fide*, and trying under the powers of the Act of Parliament to get possession of lands of *Brown* which were to be applied to other and different purposes, I think the Court would have been justified in interfering by injunction, but of this charge against the Appellants I can find no sufficient evidence, and while acting *bonâ fide* they must be considered as the proper judges of the portion of land that is required for purposes which are legitimate."

The other case refers to the question whether these accommodation works are purposes of the Act, and I think we must recollect that there is a vast distinction—at least there is to my mind—between the powers conferred by the general section in the special Act as to taking land, and the powers conferred by the 16th section of the *Railways Clauses Consolidation Act*. In the general section for taking land, which is always contained in the special Act, the land is pointed out, the limit is fixed, the landowner has notice that those lands may be required for the purposes of the railway, he may oppose in Parliament, and when the Act of Parliament is passed he knows the extreme limit as far as his land is concerned, and that it may be required for some practical purposes of the undertaking: whereas as regards the 16th section you have no such limit. The works are limited only by the necessities of the case, and it is not so easy to say beforehand the exact works that will be required or the exact extent to which the company may construct them. In the one case

(1) 9 H. L. C. 254.

there is a proviso which is not to be found in the other, that is, the proviso as to "doing as little damage as can be." There is no such limit under the general section in the special Act.

Then we come to consider what is the purpose of the Act. As I said before, every work which the company is empowered to do is a purpose. I do not mean what they are compelled to do, but what they have a power to do. But in this case we are considering the work under the 68th section which they are compelled to do, that is, they are compelled to make good the interruptions. If they are compelled to make good the interruptions, and there are two or three ways, why may they not choose which way they will do it, and if one of the ways requires to purchase some of the lands within the limit of their powers, why should they not buy the land? It is exactly within the purview of the Act, and to carry out one of the purposes of the Act. If there had been no authority, as I said before, I should have arrived at the same conclusion; but it appears to me the case of *Lord Beauchamp* v. *Great Western Railway Company* (1) is a most distinct authority. In that case the company had bought the land in question for the purpose of making an embankment. They abandoned their intention as to making the embankment. What was the result? If they had not wanted the land for any other purposes of their Act it would have become superfluous land, but they said, "We do want it for another purpose, we want it to connect severed land of the Vestry of *Clerkenwell*." They had been taking this land from Lord *Beauchamp*, and the case was decided on that ground only, that is, that they could have taken it for that purpose originally, and therefore that they might keep it for that purpose. It was not decided on the ground that they had already bought it and could keep it, but it was because they might have bought it for that purpose and could use it. In that case Lord *Beauchamp's* land lay between two portions of the land of the Vestry of *Clerkenwell*, and the company proposed to connect the lands of the Vestry of *Clerkenwell* which had been severed by the railway by making an occupation road through the land of Lord *Beauchamp*. It is the exact case we have here. In fact I can see no distinction between the two cases.

(1) Law Rep. 3 Ch. 745.

C. A. 1882 — WILKINSON v. HULL, &c., RAILWAY AND DOCK COMPANY. — Jessel, M.R.

It was suggested there as it is suggested here, that the communication could be made in another way. No doubt it could. But it was said, and said very truly, that to make the communication through a horse-shoe arch, which was the way that they proposed, would be inconvenient, that is, comparatively inconvenient. It was not suggested that the arch would not have restored the communication which had been interrupted, nor was it suggested that cattle and people could not walk through the arch without inconvenience, but what I understand Lord *Hatherley* to mean is, that it would be less convenient and more expensive if the company were compelled to do it, and he said they had the choice. In the present case we have similar evidence. Both the engineer and the neighbouring landowner say what they propose to do would be more convenient. That is a matter of opinion, but it is a matter which the company or the engineer who advises it is entitled to settle. What Lord *Hatherley* says is (1), "What duties are imposed upon the company by the general Act?" Then after reading the 68th section he says: "Now a case might well occur which would not be very different from what has occurred here, the case of two fields on the eastern side of the railway, being the whole property of the landowner, and having their only communication over a narrow strip of land running north and south, and of the company taking this strip for the purposes of their Act so as entirely to block up the communication; the company then would be compelled to find accommodation for the owner, and if they could not acquire the land of a third person for the purpose of effecting the communication, they might be brought to a standstill, or obliged at great expense to make an inconvenient communication by means of archways passing under the line." Now we were gravely asked to construe that in this way, that they might be under the obligation to make something that is not convenient. That is in the very teeth of the words of the Act. His Lordship could not have meant that. Their object is to make convenient arches, &c. He did not mean that they were under the obligation to make an inconvenient communication. What he meant was, it was enough that they are doing something much more convenient and much better than what they could

(1) Law Rep. 3 Ch. 749.

have done if they had not acquired the land. Then he says (1): "It was argued that if the company could take Lord *Beauchamp's* land for the purpose of a communication between the severed lands of another landowner, they would be entitled to cut Lord *Beauchamp's* land in two by making a communication through the middle of it, and that this unreasonable result shews by *reductio ad absurdum* that such a power cannot exist. The answer to that is, that though the company while acting *bonâ fide* are the sole judges what land they require for the purpose of their works, the Court can interfere when it sees *mala fides*, and the making the communication in the way suggested clearly would not be *bonâ fide*. Then the question is whether the making accommodation works, which the company are compelled to make, is one of the purposes of their Acts? I take it that whatever they are compellable to do is a plain purpose of their Act, though it may be well argued it is not a purpose of the Act to do for their own accommodation anything which they are not compellable to do, and accordingly, though the 45th section of the *Railways Clauses Consolidation Act* gives power to purchase land for extraordinary purposes, it does not give the company power to take it compulsorily, the acquisition of land for those extraordinary purposes not being essential to the undertaking." As I said before, I go further than that. I say whatever the company has power to do they may take the land for; but in the present case the company are doing that which they are compellable to do, and which it has been decided that they may take the land for. That is, as I said, according to the decisions; but at the same time I repeat that if there had been no such authorities I should have come to the same conclusion.

COTTON, L.J.:—

I think the order appealed from was wrong and must be discharged. That order restrains the company from taking certain lands. By the private Act the company has power to take all lands, within the prescribed limits, which may be required for the purpose of the undertaking, and the simple question we have to consider is, of course having regard to the decided cases,

(1) Law Rep. 3 Ch. 750.

C. A. 1882 WILKINSON v. HULL, &c., RAILWAY AND DOCK COMPANY. Cotton, L.J.

whether this land is required for the *bonâ fide* purposes of the undertaking, and the purpose of the undertaking for which it is said to be required is to provide accommodation works which the 68th section of the *Railways Clauses Consolidation Act* incorporated with the special Act requires the company to make.

Now I quite agree with the Master of the Rolls that it is not necessary to shew that the works in question are required to be made, that is to say, that the company can be compelled to make them. In my opinion everything which is reasonably required for the purpose of completing the undertaking which the company are authorized to make, is land required for the purposes of the undertaking; but here it is subject to the questions which have been raised.

Accommodation works are works which the company are not only authorized to make, but which they are required to make. The section requires that they shall make so many convenient gates, arches, and passages as shall be necessary for the purpose of making good any interruptions caused by the railway.

I mention here—because I think that (possibly in consequence of the affidavit of Mr. *Davey* now before us not being then before the Court) Mr. Justice *Kay* has dealt with the case as if this was not a convenient mode of restoring the communication for Mr. *Davey*, whose lands have been intersected—that there has been an affidavit filed since the motion was before Mr. Justice *Kay*, which states that *Davey* is perfectly satisfied with this, and states also that in his opinion it is more convenient than the ordinary mode which would be possible, namely, making an archway under the embankment immediately connecting the severed portions of his land. If there were not that affidavit, it might be a question whether the landowner is satisfied with this mode of communication, and he might take the proceedings pointed out by the Act; but even if there had not been that affidavit, I should say we are not to consider the landowner unless he is objecting.

We are to consider whether, without any objection by him, and any evidence before us, we should be justified in saying that this land is not required for any purposes of the undertaking. To say that to enable the company to take this land it must be shewn that it is necessary to take it, is rather an erroneous way

of arguing on the 68th section. The communication is to be such as is necessary for restoring the interrupted communication between the intersected lands,—necessary, that is to say, to restore in a convenient and proper way, having regard to the facts of the case, the communication between the lands, and when once that is established, the long series of cases, as well as common sense and principle, lay down that you must leave the engineer of the company, who is intrusted with the power of executing the works authorized by the Act of Parliament, the duty of determining in what particular way the company will do that which is authorized by the Act. Here it cannot be doubted that an arch somewhere under the embankment of the railway company is required and is necessary for the purposes of restoring the communication. When once that is arrived at, taking the principle laid down by Lord *Cranworth*, that for the purpose of doing that work which is authorized by the Act of Parliament the engineer must determine what land is required for the purpose, this order is shewn to be, in my opinion, erroneous. A great deal of stress was laid on that word "necessary"; but in the passage from the judgment in *Stockton and Darlington Railway Company* v. *Brown* (1) quoted by the Master of the Rolls, Lord *Cranworth* says that discretion must be left to the engineer. So that even if the word "necessary" which is found in the 68th section had been the word used in the special Act in the clause giving them the power to take lands, the result, in my opinion, would have been just the same. But we are not driven to that. In this Act it is simply that this is "required for the purposes of the undertaking," the undertaking including the accommodation works and those being necessary, it is, having regard to the decided cases, for the engineer of the company to say what land is to be taken.

It is said that it would lead to an absurdity, that you might have an engineer certifying that a strip of land was required for an entirely unreasonable purpose. But what is left to the discretion of the engineer is limited by the decided cases and common sense. If you see he is taking land which is not required for the purpose of restoring the interrupted communication, then the Court ought to come to the conclusion that he is not acting

(1) 9 H. L. C. 246.

C. A. 1882 — WILKINSON v. HULL, &c., RAILWAY AND DOCK COMPANY. — Cotton, L.J.

in an honest exercise of the discretion left to him, but for some other purpose, and will not then give that weight to his affidavit which will be given to it when the Court sees no ground for supposing he is acting otherwise than honestly.

I would add a few words about the case that has been pressed upon us of *Pugh* v. *Golden Valley Railway Company* (1). It was suggested that the case was in favour of the order of Mr. Justice *Kay*. In my opinion that is not so. The decision there was that the railway company, coming on a river very much winding, the course of that winding river being crossed by the railway, had no power to divert it so as entirely to take it away from one side of their railway. And on what ground? It was that the 16th section must be read *reddendo singula singulis*, that when in making a railway it is necessary to divert the river, then the diversion may be made; if it is necessary to cross it, then the crossing may be made, but the mode of the diversion and the mode of crossing, when it is ascertained that that is the way which is necessary for the construction of the railway, is left entirely to the discretion of the engineer.

This, as I understand, is the meaning of what was said by Lord Justice *Thesiger* in giving the judgment of the Court; what he says is this (2): "A railway company in the course of the construction of the line of railway authorized by the special Act, will, from time to time, arrive at a point where a river or stream of water, or a road, street, or way, obstructs the further progress of the works. The course or level of the obstruction will be such as naturally to require its being carried sometimes over, at other times under, and at other times by the side of the railway, and whichever of these three modes may in the particular instance be the mode of dealing with the obstruction naturally requiring to be adopted, the company may, in order the more conveniently to carry out that mode, alter or divert the course or raise or sink the level of the river or stream of water, or of the road, street, or way constituting the particular obstruction; and the exact manner in which and extent to which, for the purpose mentioned, the company may carry out that alteration or diversion of the course, or raising or sinking of the level of the obstruction, is, by the

(1) 15 Ch. D. 330. (2) 15 Ch. D. 337.

words 'as they may think proper,' left to their discretion, which the Courts will not interfere with if *bonâ fide* exercised."

In this case, from the nature of the interruption between the portions of Mr. *Davey's* land which have been intersected, an archway under the embankment and under the railway is necessary, and the mode of dealing with that necessity is left to the engineer of the company. It is for him to say in his discretion what will be the proper mode of giving a convenient archway or means of communication to Mr. *Davey*. Here there is reason for supposing that this is the most convenient mode, and there is no reason for doubting that the company are acting *bonâ fide* in adopting the course which, under the advice of their engineer, they have determined to adopt.

LINDLEY, L.J.:—

I am of the same opinion. It will not be necessary for me to add much to the remarks already made. The main question for us to consider is this, whether there are any grounds here for preventing the railway company from taking that piece of land which at present belongs to the Plaintiff, Mr. *Wilkinson*. Of course, if they have no right to take it he is entitled to an injunction to restrain them from doing so. Whether they have a right to take it depends upon the true construction of the company's Act of Parliament, which alone can give them power to take land, and we must look at the language of that Act, and the language we have to consider more particularly is comprised in the 5th section of that Act, and that section authorizes the company to take such lands as are marked on the deposited plans and specified in the Act "as may be required for the purposes of the undertaking." Now what is meant by that expression? Let us first take "for the purposes of the undertaking." Does the company seek to acquire this piece of land for the purpose of the undertaking? In order to answer that question we must see for what purpose they are seeking to acquire it, and when we look into the facts of the case, the purpose for which they seek to acquire it is the construction of a passage for the accommodation of Mr. *Davey* whose lands they have intersected by an embank-

C. A. 1882 — WILKINSON v. HULL, &C., RAILWAY AND DOCK COMPANY. — Lindley, L.J.

ment. Is that a purpose of the undertaking? I take it it is quite plain it is. Is it *bonâ fide* for that purpose? Is it sought to be acquired for that object, or for some other object under cloak of that apparent object? The *bona fides* in that limited sense is not really in dispute. We come so far, therefore, on the road, that, whether required or not, the company are seeking to take it *bonâ fide* for the purpose of their undertaking. But that is not enough. The Plaintiff says, "But it is not required for that purpose." The argument of the Plaintiff is this: "It is not required for that purpose, it is not necessary for that purpose, because the company can attain the same purpose in some other way." It appears to me that this argument when looked at is suicidal and destructive. The object is a legitimate one and a proper one. Supposing there are half-a-dozen ways in which the object may be accomplished, you may say of any one of those half-a-dozen that it is not necessary because there are five other ways of doing the same thing, and so you can go by parity of reasoning from one to another, and thus negative each way of doing what is required. The true way to deal with this argument is as follows: if you once see that the object is a legitimate one and there are several methods of accomplishing it, you leave the company to decide which method is the best. I see no other practical mode of dealing with the argument, and I should come to this conclusion quite apart from all authorities.

Then when we look at the authorities, I think that we shall see that they are all in favour of this view, whether we take them historically from the beginning, or whether we confine ourselves to the more recent decisions. We must bear in mind that this is not a case of diverting roads or streams under the 16th section of the *Lands Clauses Consolidation Act*. The class of cases which bears upon the question is illustrated by the case of *Eversfield* v. *Mid-Sussex Railway Company* (1), by the *Stockton and Darlington Railway Company* v. *Brown* (2), by *Kemp* v. *South Eastern Railway Company* (3), *Lord Beauchamp* v. *Great Western Railway Company* (4); and if we look at those cases and consider

(1) 3 De G. & J. 286.
(2) 9 H. L. C. 246.
(3) Law Rep. 7 Ch. 364.
(4) Ibid. 3 Ch. 745.

C. A. 1882 WILKINSON v. HULL, &c., RAILWAY AND DOCK COMPANY. Lindley, L.J.

the result, I think it comes to this: It is not sufficient for an engineer to say he wants this, that, or the other, for the purpose of the company, there must be some evidence to enable the Court to test his opinion; there must be sufficient evidence to satisfy the Court that what he says is wanted is *bonâ fide* wanted for some legitimate purpose; but the moment the Court is satisfied with the *bona fides* and honesty of the engineer, that is sufficient; and it seems to me that this particular case is exactly like *Lord Beauchamp* v. *Great Western Railway Company* (1) and the other cases as regards the general principle of construction. I cannot see any distinction between the case of *Lord Beauchamp* v. *Great Western Railway Company* and this case. That case has been so much commented upon that I need not pursue it further. For these reasons, I am of opinion that the appeal should be allowed, and that the order of Mr. Justice *Kay* granting the injunction must be discharged.

Solicitors for Appellants: *Brooksbank & Galland,* agents for *Lowe & Co., Hull.*

Solicitors for Plaintiff: *Frankish & Buchanan.*

M. W.

Ex parte ALLEN. *In re* FUSSELL.

C. A. 1882 *March* 16.

Leasehold Interest of Bankrupt—Disclaimer by Trustee—Lease of Land and Chattels—Reputed Ownership—Bankruptcy Act, 1869 (32 & 33 *Vict.*) *c.* 71, *ss.* 15 (*sub-s.* 5), 23.

Sect. 15 of the *Bankruptcy Act,* 1869, must be read in conjunction with and as qualified by sect. 23, and the effect of a disclaimer of a lease to a bankrupt by the trustee in the bankruptcy, is to give up to the lessor the entirety of that which is comprised in the demise.

Therefore, if a bankrupt be the lessee of land and personal chattels, demised to him as one subject-matter at one entire rent, a disclaimer of the lease by the trustee operates as a surrender to the lessor of the chattels, as well as the land, and the trustee cannot claim the chattels under sect. 15 (sub-sect. 5), as having been at the commencement of the bankruptcy in the order or disposition of the bankrupt as reputed owner with the consent of the true owner.

A disclaimer of a lease to a bankrupt by the trustee in the bankruptcy

(1) Law Rep. 3 Ch. 745.

C. A.
1882
Ex parte ALLEN.
In re FUSSELL.

operates to relieve the trustee from all liability under the lease, not merely from liability as from the date of the adjudication

Ex parte Glegg (1) explained.

Leave to appeal to the House of Lords refused.

THIS was an appeal from a decision of Mr Registrar *Brougham*, acting as Chief Judge in Bankruptcy.

By an indenture of lease, dated the 20th of March, 1878, and made between *Joseph James Maberley* of the first part, *J. C. Melvill* and *R. M. Beachcroft* of the second part, the Rev. *J. G. C. Fussell* of the third part, *Janet Jemima Fussell* (the wife of the said *J. G. C. Fussell*) of the fourth part, *Mary Feilding, Janet Warrender Fussell,* and *Sarah Juliana Fussell,* of the fifth part, the Rev. *James Wyatt* and the said *Joseph James Maberly* of the sixth part, and *James Thomas Richard Fussell* (therein called the lessee) of the seventh part, some ironworks, known as the *Wells Ironworks,* the *Stoney Lane and Railford Ironworks,* and the *Elm Ironworks,* together with all the engines, machinery, landlord's fixtures, trade and tenant's fixtures, fixed and loose plant, tools and appliances in, or upon, or belonging to the said several mills, works, and hereditaments, and mentioned in a schedule to the deed, were demised to the lessee, his executors, administrators, and assigns, for the term of twenty-one years from the 25th of December, 1877, at the yearly rent of £600, and subject to the performance and observance of the covenants and conditions in the said indenture respectively contained.

The lessee carried on at the mills comprised in the lease the business of an edge tool manufacturer, under the firm of *James Fussell, Sons, & Co.* On the 13th of April, 1881, he filed a liquidation petition, under which a trustee was appointed. The trustee afterwards applied to the Court of Bankruptcy for leave to disclaim the lease, and on the 20th of September, 1881, an order was made giving him leave to do so. The order contained a recital that "part of the property of the said *J. T. R. Fussell* acquired by the said trustee consists of the said indenture of lease and the property now belonging to the lessors demised thereby," and the order gave the trustee "liberty to disclaim all such property."

(1) 19 Ch. D. 7.

The trustee on the 27th of September, 1881, executed a disclaimer, which contained a recital in similar terms, and by it the trustee disclaimed "all such property."

Notwithstanding the execution of the disclaimer the trustee claimed to be absolutely entitled to all the loose chattels belonging to the lessors which were on the demised premises and in the possession of the debtor at the commencement of the liquidation, on the ground that they were at that time in the debtor's possession as reputed owner with the consent of the true owners. And the trustee applied to the Court for an order declaring that the machinery, tools, plant, chattels, and effects on, or upon, or belonging to the premises upon which the debtor carried on his business, except such machinery and effects as were permanently fixed and fastened to the premises, formed part of the debtor's estate divisible among his creditors, and directing the lessors to deliver up the same to the trustee. There was no evidence of the existence of any trade custom excluding the application of the doctrine of reputed ownership.

The Registrar dismissed the application.

The trustee appealed.

Winslow, Q.C., and *G. W. Lawrance*, for the Appellant:—

The disclaimer does not affect the title of the trustee to the loose chattels. They were at the commencement of the liquidation in the order and disposition of the debtor as reputed owner with the consent of the lessors, and they vested absolutely in the trustee as from the commencement of the liquidation: *Bankruptcy Act*, 1869, sects. 11, 15 (sub-sect. 5). The trustee does not claim the chattels under the lease, but by an independent and superior title, and the disclaimer does not affect his right.

[JESSEL, M.R.:—If there were a lease of chattels alone, on your theory the trustee could get rid of the rent and keep the chattels.]

In granting leave to disclaim a lease the Court has power to impose conditions. Indeed sect. 23 allows the trustee to disclaim only a lease of land with onerous covenants; it does not apply to a lease of chattels.

C. A. 1882 *Ex parte* ALLEN. *In re* FUSSELL.

[JESSEL, M.R.:—If that is so the trustee could never get rid of a lease of a furnished house. And he would not be entitled to the furniture, because the custom of letting furniture would exclude the doctrine of reputed ownership.]

Macnaghten, Q.C., and *Finlay Knight*, for the lessors, were not heard.

JESSEL, M.R.:—

To say that there is no difficulty in construing sect. 23, or that it is easy to apply it, would be to say that which I do not think true, and that which I do not believe any Judge has ever said. The section is imperfectly drawn, and we must do our best to put a fair construction on it. Now as I understand *Ex parte Glegg* (1) it decided two things. First of all it decided that the thing to be got rid of by the disclaimer is the entire lease, and not a part of it, by which I mean all that is comprised in the lease. In that case it was not a question of property, but a question of proviso or covenant, and we held that the whole lease, including the proviso, was gone. A second point was no doubt decided there, though it appears in the report as if it was decided by me alone, but what I said was with the concurrence of the other members of the Court. That is, that though there are no words in the Act expressing it, and though all the Act says is that the lease is to be deemed to have been surrendered at the date of the adjudication, yet the Act intended to relieve the trustee from liability under the lease altogether, and that no interest in or liability under the lease should remain in him between the commencement of the bankruptcy and the date of the adjudication. The present case does not rest exactly on either of those points. Here there is a lease to the debtor of land, chattels, and loose tools for a term at one entire rent. The trustee alleges that by virtue of sect. 15, sub-sect. 5 of the statute, and the decisions on reputed ownership, it being a lease of tools which were not accustomed to be leased by any usage of trade, the apparent ownership of the bankrupt was his reputed ownership, and that therefore the tools in question passed to the

(1) 19 Ch. D. 7.

trustee. I will assume that in his favour. But, assuming that, what is the effect of these sections? The 15th section defines what is the property of the bankrupt divisible amongst his creditors. The 23rd section takes out of that property certain things. Consequently, you must read the 15th section as if these words had been in it, "subject to the provisions of the 23rd section hereinafter contained, the property of the bankrupt divisible amongst his creditors shall comprise the following particulars." It is impossible that you can divide any property under the 15th section amongst the creditors if by sect. 23 it is given away to somebody else. Therefore, that is the only possible way of reading sect. 15, and if so, what follows? It follows that the title of the trustee under the 15th section is subject to be divested by the 23rd section, in all cases to which that section applies. Now the 3rd sub-section of sect. 15 applies not only to property which may have belonged to the bankrupt at the commencement of the bankruptcy, but also to property which may be acquired by or devolve on him during its continuance. And the 5th sub-section includes "All goods and chattels being, at the commencement of the bankruptcy, in the possession, order, or disposition of the bankrupt, being a trader, by the consent and permission of the true owner, of which goods and chattels the bankrupt is reputed owner, or of which he has taken upon himself the sale or disposition as owner." So that we have three classes of property divisible among the creditors, property belonging to the bankrupt at the commencement of the bankruptcy, property subsequently acquired by him during the bankruptcy, and property which did not belong to him at all, but which, at the commencement of the bankruptcy, was in his possession as reputed owner. Then the 23rd section says, "When any property of the bankrupt acquired by the trustee under this Act" (that includes every kind of property acquired by him, whether it is acquired under any one or other or under all of these three titles) "consists of land of any tenure burdened with onerous covenants, of unmarketable shares in companies, of unprofitable contracts, or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act," the trustee "may disclaim such property."

C. A. 1882 *Ex parte* ALLEN. *In re* FUSSELL. Jessel, M.R.

Now, it is quite possible that the bankrupt may be the reputed owner of property which may bind him to the performance of some onerous act, and in that case the trustee is not to be compelled to keep it, any more than he is to be compelled to keep property of that nature which belonged to the bankrupt at the commencement of the bankruptcy, or which devolved on him during the continuance of the bankruptcy. The object of the section is to enable the trustee to get rid of it, if it is what lawyers call *damnosa hæreditas*. Then sect. 23 goes on to say how a disclaimer shall operate. But the primary operation of the section is to enable the trustee to disclaim, that is, to get rid of the property; the subsidiary operation (if I may use that term) is to explain how the disclaimer is to take effect in cases to which that subsidiary operation is applicable. It cannot be applied literally in every case, as I shall shew in a moment. Sect. 23 proceeds, "And upon the execution of such disclaimer the property disclaimed shall, if the same is a contract, be deemed to be determined from the date of the order of adjudication, and if the same is a lease, be deemed to have been surrendered on the same date, and if the same be shares in any company, be deemed to be forfeited from that date." Now, it is quite plain that some of these words will not apply to every kind of property. For instance, suppose a lease is granted to the bankrupt after the commencement of the bankruptcy, after the adjudication. That is property acquired by him during the continuance of the bankruptcy, and it is within the purview of the 15th section. If it is not worth anything the trustee is not bound to take it, he may disclaim it, and still the words "be deemed to have been surrendered on the same date" cannot possibly apply. You must therefore read the words as applicable only to the cases to which they can apply. If they do not apply, still you must give its proper meaning to the word "disclaim," that is, the trustee is to get rid of the property. That being so, what can he disclaim? It seems to me that what the Legislature contemplated was this, that, if the property was comprised in a lease, he must disclaim it all. He cannot say to the landlord, "I will disclaim part of the property, and keep the rest." There is no provision in the Act for apportioning the rent and

the covenants. Suppose it was a lease of *Black Acre* and *White Acre* at one entire rent, and subject to the same covenants. Would it be possible to hold that the trustee could say *Black Acre* is worth keeping and *White Acre* is not, if I can apportion the rent, and that he could disclaim a part, so as to give back to the landlord the property which is of very little value, and keep the property which is of very great value. That would not be fair to the landlord. The trustee must take it as it is, or give it up altogether. I give no opinion how it would be if the two properties had really been let separately. It might happen that, though included in the same piece of parchment, there might be two distinct demises. In such a case it is possible that the word "lease" in sect. 23 might be held to apply to one of the demises only. But where, as in the present case, there is really only one demise at one rent, and subject to the same covenants, I think it must be held that, if the trustee gives it up at all, he must give up the whole, and that when sect. 23 says "deemed to be surrendered," it means that the whole shall be surrendered, that is, he is to surrender all the property comprised in the lease. If that is so, if the trustee is to yield up to the landlord what is comprised in the lease, why should we say it does not apply to property which he has acquired under sub-sect. 5 of sect. 15, as well as to other property? It seems to me that the rational interpretation of sect. 23 is, that the trustee must surrender the whole, and, consequently, the decision of the learned Registrar is correct.

COTTON, L.J.:—

I am of the same opinion. The trustee in the liquidation after he has disclaimed a lease under sect. 23 claims part of the property which is comprised in the lease. If it was the intention of the Legislature that such a hardship should be inflicted on the landlord, that the trustee should be able to disclaim part of the property comprised in a lease and keep the rest, probably the most valuable part, one would have expected to find it expressed in clear language in the Act. What, then, is the construction of sect. 23? It certainly is not clear, but in my opinion the true

C. A.
1882
Ex parte ALLEN.
In re FUSSELL.
Cotton, L.J.

construction justifies the order which has been made. It is easy to point out in how many ways the language of this section is not quite accurate. It says, "when any property of the bankrupt acquired by the trustee under this Act consists of land of any tenure burdened with onerous covenants, of unmarketable shares in companies, of unprofitable contracts, or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the trustee, notwithstanding he has endeavoured to sell, or has taken possession of such property, or exercised any act of ownership in relation thereto, may by writing under his hand disclaim such property, and upon the execution of such disclaimer the property disclaimed shall, if the same is a contract, be deemed to be determined from the date of the order of adjudication, and if the same is a lease, be deemed to have been surrendered on the same date." In one part it is dealing with the property which is to be disclaimed, in the other it says that if that property is a lease, the disclaimer shall have such and such an effect. But what we have to consider is this. There is to be a disclaimer, and that disclaimer is to have the same effect as if the lease had been surrendered at the date of the adjudication. Therefore, nothing can be done by means of the disclaimer which is inconsistent with the surrender of the lease which comprised the property which is to be disclaimed. In my opinion a surrender of a lease involves this, that there shall be a giving back to the lessor of the entirety of the property which is comprised in the lease, with a corresponding release of the tenant from the covenants contained in the lease. A surrender implies the giving up in its entirety of the lease which is put an end to by the surrender. Therefore, I am of opinion that, when there is a disclaimer which is to have the effect of a surrender, there must be a surrender, a giving back to the landlord, not only of part, but of the entirety of the property which he demised by the lease. It is said that sect. 23 does not apply to a lease of chattels, because it is confined to property of the bankrupt acquired by the trustee consisting of "land of any tenure burdened with onerous covenants." If that is so, this lease cannot be dis-

claimed at all, for, if the section applies, it must be surrendered in its entirety. Here we have a lease of land, and together with the land there are demised certain chattels. In my opinion, although the property referred to in the section is land, yet, when the trustee disclaims the lease, the effect is a surrender of the entire lease and of the entire property comprised in it even though there is something more than land comprised in it.

But then it is said that the 15th section enables the trustee to hold these chattels by a superior title. Sect. 23, however, applies to "any property of the bankrupt acquired by the trustee," that is, to any property divisible amongst the creditors of the bankrupt, which is the property mentioned in sect. 15, and as the lease, which would under sect. 15, but for sect. 23, go to the benefit of the creditors, is taken out of the provisions of sect. 15, in my opinion not only must the land comprised in that lease be taken out of the provisions of sect. 15, and not become divisible amongst the creditors, but the other property comprised in the lease, though the trustee has a title to it under sect. 15, must in like manner be taken out of the operation of sect. 15 as soon as the trustee exercises his option of disclaimer under sect. 23. He has an option of disclaimer, and if he thinks, having regard to the value of the property in its entirety, that it is to his benefit to keep the lease, he need not disclaim it. But, if he does disclaim it, in my opinion, he must surrender and give up to the lessor in its entirety all that which is comprised in the lease, and he cannot in any way rely upon the title given to him by sect. 15.

LINDLEY, L.J.:—

I am of the same opinion. We have to construe sect. 23, not by itself, but in connection with sect. 15, sub-sect. 5, and the first thing is to ascertain the true meaning of the words of sect. 23. Now sect. 23 is not very well drawn, and it is full of puzzles, but I think we can understand it so far as is necessary for the present purpose. [His Lordship read sect. 23, and continued:—]

I take it that that which is to be disclaimed is the property in the lease, and that which is to be surrendered is the property demised by the lease, and if you have, as here, several properties treated as one—the mill, machinery, and tools all demised as a

C. A.
1882
Ex parte ALLEN.
In re FUSSELL.
Lindley, L.J.

going concern at an entire rent and subject to the same covenants —that is the property which the trustee must take or disclaim. If he disclaims he must surrender to the lessor all that property. That appears to me to be the true meaning of sect. 23. Then is its meaning modified by sect. 15, and by reason of the circumstance which has been relied upon by Mr. *Winslow?* He says that at the commencement of the bankruptcy these chattels were in the order and disposition of the bankrupt with the consent of the true owners. I will assume that to have been so, and that they were by relation vested in the trustee as from a time anterior to the date of his appointment. That being so, it is said that the trustee is not bound to surrender them, because he has got a title to them apart from the lease, and he is discharged from all the covenants and conditions of the lease. Well, be it so, but still when we come to consider what is to be surrendered, we must be guided by sect. 23, and, for the reasons which I have already given, it appears to me that what the trustee is to surrender is the property demised by the lease. That is what sect. 23 says when we come to examine it closely, and the mere fact that the trustee has got the chattels by two distinct titles does not appear to me to entitle him to surrender a part only of the one property demised by the lease, and to keep the rest. He cannot do that. He must surrender all or none.

Winslow asked for leave to appeal to the House of Lords, on the ground that the property was of large value, and that a difficult question of law was involved.

JESSEL, M.R.:—

I do not think this is a case in which we ought to give leave. As I have often said, the power was given to us to be exercised in proper cases. Here it is a trustee in bankruptcy who wants to appeal, at the cost of the estate of course, and to delay the division of the property. That is not a thing which we ought to encourage, unless we think that there is a very difficult question of general law which it is desirable that the House of Lords should settle. I do not think that there is any such question in the present case. Besides, I am well aware that there is an intention

of bringing in a new Bankruptcy Bill, and I hope that will settle all these questions.

C. A. 1882 Ex parte ALLEN. In re FUSSELL.

Solicitors for Trustee: *Lawrance, Plews, & Baker*, agents for *Dunn & Payne, Frome.*

Solicitors for Lessors: *Beachcroft & Thompson.*

W. L. C.

In re GREAT BRITAIN MUTUAL LIFE ASSURANCE SOCIETY.

C. A. 1882 Feb. 8.

Life Assurance Company—Life Assurance Companies Act, 1870 (33 & 34 *Vict.* c. 61), *s.* 22—*Reduction of Contracts—Date at which Contracts to be ascertained.*

A petition having been presented for the winding-up of a life assurance company, an order was made under the *Life Assurance Companies Act*, 1870, s. 22, directing a scheme to be prepared for the reduction of the contracts of the company:—

Held (affirming the decision of *Hall*, V.C.), that in the absence of special circumstances the contracts to be included in a scheme for reduction are to be ascertained, not at the time of settling the scheme, nor at the date of the order directing a scheme, but at the date of the presentation of the winding-up petition, so that no persons whose contracts have not matured into debts until after the presentation of the petition are entitled to be paid in full.

THIS was an appeal from a decision of Vice-Chancellor *Hall* (1).

The Appellants were persons who had purchased annuities from the society.

Eddis, Q.C., and *Grosvenor Woods*, for the Appellants:—

We say that the debts and liabilities ought to be ascertained, not at the date of the presentation of the petition, but either at the time when the scheme is made or at the time when the Court orders it. The question turns on the *Life Assurance Companies Act*, 1870, s. 22, and is, at what time are the contracts to be ascertained, it having been decided that those which had ripened into debts before that time are to be paid in full? The Vice-Chancellor thought that as, if a winding-up order had been made, everything would relate back to the time of presenting the first petition,

(1) 19 Ch. D. 39.

C. A. 1882 *In re* GREAT BRITAIN MUTUAL LIFE ASSURANCE SOCIETY.

the case must be decided by analogy to that rule. But an order under the 22nd section is not a winding-up order, and there is nothing in the Act which points to such an analogy.

[JESSEL, M.R.:—In this case a winding-up order was made, and the order for reducing contracts is in substitution for it.]

We submit that as the winding-up order has been discharged, the case stands on exactly the same footing as if it had never been made. In the winding-up of a fire insurance company, although *primâ facie* the presentation of the petition is the time for ascertaining claims, yet a policy-holder whose claim has subsequently ripened into a debt proves for the whole amount: *Macfarlane's Claim* (1). This furnishes an analogy. So, in winding up an insolvent's estate, a contingent claim which ripened into a debt after the period allowed for valuation but before certificate, was allowed to be proved in full: *Hill* v. *Bridges* (2). These cases follow the rule in bankruptcy.

[JESSEL, M.R.:—Is it not the principle of the Act to substitute a dividend by the Court for a dividend to be paid by a liquidator. If so, it would be strange for the dividend to be paid to different people from those who would receive dividends from the liquidator.]

The persons whose claims had matured before the presentation of the petition would only have received a dividend under a winding-up, but under the scheme they are paid in full. The Act had the object of preventing the ruin arising to policy-holders from the total failure of their insurances, and the natural time for ascertaining the claims is either the time of the scheme or of the order directing the scheme.

Kekewich, Q.C., and *Chubb*, for participating, and

Hastings, Q.C., and *Dundas Gardiner*, for non-participating policy-holders whose policies were current.

W. Pearson, Q.C., and *T. Ribton*, for non-participating, and

W. W. Karslake, Q.C., and *Beddall*, for participating policy-holders whose claims had matured before the petition.

(1) 17 Ch. D. 337. (2) 17 Ch. D. 342.

Robinson, Q.C., and *Kirby*, for the special referee and a committee of policy-holders, and

Buckley, for policy-holders in the B series, were not called on.

JESSEL, M.R.:—

This is an appeal from Vice-Chancellor *Hall*, and raises an important question as to the mode of acting under the *Life Assurance Companies Act*, 1870, s. 22. The theory of the enactment is, that if the company is insolvent the Court may reduce the contracts instead of making a winding-up order; that is, it may in substance give the persons entitled to the benefit of those contracts a dividend of a special kind. The meaning of the Act is this, that it should be ascertained what the company can pay, and that the contracts should be reduced accordingly. If the company can only pay half its liabilities, reduce its contracts by one half. The persons entitled under the contracts thus get more than they could under a winding-up order, because they are saved the costs of winding-up proceedings, and the result is advantageous to every one to whom the company is under a liability. That being so, on what principle ought the Court to fix the period for ascertaining the contracts? It is submitted by those who have claims which have ripened into debts since the presentation of the winding-up petition, but before any order was made for a scheme, that they ought to be paid in full. If the winding-up had gone on they would have got only a dividend from the liquidator, and why are they under the scheme to be placed in a better position as between themselves and the other parties who have entered into contracts with the company, than they would have been if the winding-up had gone on? The scheme is a substitution for a winding-up order; the company instead of paying its debts pays a dividend, and the substitution of a scheme for a winding-up order ought not to alter the rights of the parties *inter se*. That the persons whose claims had ripened into actual debts before the presentation of the petition are to be paid in full, is no argument for extending that privilege to other people. The Legislature probably considered that there would be but few persons whose claims had ripened into debts before the presentation of the

C. A. 1882 *In re* GREAT BRITAIN MUTUAL LIFE ASSURANCE SOCIETY. Jessel, M.R.

petition, and that their case need not be attended to, since, if a company does not pay its policies, proceedings are speedily taken for winding it up. That a few persons so circumstanced get an advantage which may be considered unfair, is no reason for extending that advantage to other people.

The analogy attempted to be drawn from the rule in bankruptcy is fallacious. A contingent liability which ripens into a debt becomes provable in full at any time during the bankruptcy, though the creditor cannot disturb past dividends. As to the time when the scheme is made being the time for ascertaining the contracts, that is impossible, for a scheme cannot be made without knowing what the contracts are; and they must, therefore, be ascertained at some prior time. To ascertain the contracts at the time when the order for a scheme is made would make the rights of the parties depend on the delays of judicial procedure. I am of opinion that as a general rule the proper time for ascertaining the contracts is the time of the presentation of the petition, though I do not mean to say that under the discretion given by sect. 22 the Court might not fix another time if there were special circumstances to take the case out of the general rule. The appeal must be dismissed.

BAGGALLAY, L.J.:—

Under a petition for winding up this company an order was made to reduce the amounts of the contracts on certain terms. One term was that the presentation of the winding-up petition should be taken as the time when the rights of the claimants should be ascertained. The question before us is whether that part of the order is wrong. The ground taken by the Vice-Chancellor was that an order under the 22nd section takes the place of a winding-up order, and that the rights of the parties should be ascertained at the same time as if a winding-up order had been made. If a winding-up order had been made it would have taken effect according to the state of things at the presentation of the petition; and the Vice-Chancellor thought that unless there was something very special in the case the substituted order ought to take effect in the same way. Is that the correct construction of the section? The section does not specify any day, and therefore

it is not necessary to say, and I do not say, that under no circumstances could a day be fixed different from the day of the presentation of the petition; but it seems right to hold that unless there are special circumstances that day is the proper day. The other times suggested appear to be objectionable. The time of settling the scheme is a time which it is impossible to adopt. The taking the date of the order of the Court of Appeal would make the rights of the parties depend on delays occasioned by the state of business in the Appeal Court. If any time other than that of presenting the petition is to be chosen, I think it should be the time when the petition first came on before the Vice-Chancellor, when he might have made the order which the Court of Appeal afterwards held that he ought to have made; but that again would make the rights of the parties depend on the state of the business of the Court but for which the order might have been made at the end of the seven days allowed by the Act. As the scheme takes the place of a winding-up order, I think that as a general rule the contracts must be ascertained at the date of the presentation of the winding-up petition.

HOLKER, L.J.:—

Under the 22nd section the Court has power, in place of a winding-up order, to make an order reducing the contracts of the company. The section gives the Court a wide discretion; the reduction is to be made "upon such terms and subject to such conditions as the Court thinks just." To determine what is just the Court must look to the circumstances of each case. And, in my opinion, it would not be just here to vary the scheme in the way asked by the Appellants. The effect of the variation would be to pay in full a number of persons who if the winding-up had gone on would only have received dividends.

Solicitors for Appellants: *Bellamy, Strong, & Baker.*

Solicitors for Respondents: *Deane, Chubb, & Co.; Miller & Vernon; Longcroft & Myers; Bellamy, Strong, & Baker; Ashurst, Morris, & Co.; Flux & Co.*

H. C. J.

C. A.
1882
March 9.

Ex parte WARD. *In re* WARD.

Debtor's Summons—Security—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 7—*Rules of London Stock Exchange—Appointment of Settling Day obtained by Fraud—Defaulter—Private Administration of Assets by Official Assignee—Member of Committee—Disqualification by reason of Interest.*

When the proceedings on a debtor's summons are stayed, pending an action to try the validity of the alleged debt, in determining whether the alleged debtor should be required to give security regard ought to be had not only to his solvency or insolvency, but to the probability of his success in the action. If the Court can see that he has no reasonable defence he ought to be required to give security.

Ex parte Wood (1) and *Ex parte Wier* (2) approved and followed.

By one of the rules of the *London Stock Exchange* bargains in the shares of a new company are contingent on the appointment of a special settling day by the committee:—

Held, that, if the appointment of a settling day has been obtained by fraud, the validity of contracts in relation to the shares of the company, entered into by persons who were not actors in or parties to the fraud, is unaffected.

A member of the committee of the *Stock Exchange* who takes part in the appointment of a settling day is not in so doing acting in a judicial capacity, and is not, therefore, disqualified from acting by reason of his having a personal interest in the matter.

A creditor of a defaulter on the *Stock Exchange* who has taken the benefit of the private distribution of *Stock Exchange* assets, made by the official assignee of the *Stock Exchange* under its rules, is not precluded from afterwards taking ordinary legal proceedings for the recovery of his debt, though he must give credit for what he has received from the official assignee.

THIS was an appeal from an order made by Mr. Registrar *Pepys*, acting as Chief Judge in Bankruptcy, that the proceedings on a debtor's summons for £5623, issued by *Harris, Goldsmid, & Co.*, stock and share dealers, against *William Ward*, a stock and share broker, should be stayed, pending the trial of an action to try the validity of the debt claimed, on the terms of *Ward's* giving security to the amount of £6623. The order was made upon an application by *Ward* to dismiss the summons, on the ground that he was not indebted to the summoning creditors, and he con-

(1) 4 D. M. & G. 875. (2) Law Rep. 7 Ch. 319.

tended that at any rate he ought not to have been required to give any security.

Both *Ward* and *Harris, Goldsmid, & Co.* were members of the *London Stock Exchange.*

By the rules of that body all its members are personally liable upon all contracts which they enter into, even though they be really acting as brokers for a principal.

The following rules (edition of 1881) are also material for the present purpose:—

51. "The *Stock Exchange* does not recognise in its dealings any other parties than its own members: every bargain, therefore, whether for account of the member effecting it, or for account of a principal, must be fulfilled according to the rules, regulations, and usages of the *Stock Exchange.*

52. "No member shall attempt to enforce by law a claim arising out of *Stock Exchange* transactions against a member or defaulter, or against the principal of a member or defaulter, without the consent of such member, of the creditors of the defaulter, or of the committee."

125. "Bargains in the scrip of a new loan, or the shares of a new company, are contingent on the appointment of a special settling day."

128. "The committee will appoint a special settling day for transactions in the shares of a new company, provided that no allegation of fraud be substantiated; that there has been no misrepresentation or suppression of material facts; that sufficient scrip or shares are ready for delivery, and that no impediment exists to the settlement of the account."

143. "A member unable to fulfil his engagements shall be publicly declared a defaulter by direction of the chairman, deputy chairman, or any two members of the committee."

149. "Creditors for differences shall have a prior claim on all differences received by, or due to, a defaulter's estate."

167. "Two or more members shall be appointed annually by the committee, to act as official assignees, whose duty it shall be to obtain from a defaulter his original books of account, and a statement of the sums owing to and by him, to attend meetings of creditors, to summon the defaulter before such meetings; to

C. A. 1882

Ex parte WARD. *In re* WARD.

enter into a strict examination of every account; to investigate any bargains suspected to have been effected at unfair prices; and to manage the estate in conformity with the rules, regulations, and usages of the *Stock Exchange*."

169. "The assignees shall collect and pay the assets to the credit of their joint account at a banker's, and shall distribute the same as soon as possible.

170. "In every case of failure, the official assignee shall publicly fix the prices current in the market immediately before the declaration, at which prices all persons having accounts open with the defaulter shall close their transactions by buying of or selling to him such stocks, shares, or other securities as he may have contracted to take or deliver, the differences arising from the defaulter's transactions being paid to, or claimed from the official assignees. In the event of a dispute as to the prices named, they shall be fixed by two members of the committee."

In October, 1881, *Ward* was commissioned by one *Marcus Bebro* to buy for him all the shares he could obtain in a company called "the *Quartz Hill Consolidated Gold Mining Company*," then recently formed, and *Ward* accordingly bought a large number of these shares from *Harris, Goldsmid, & Co.* At the time when these purchases were made no special settling day had been appointed by the committee of the *Stock Exchange* for the shares of the company. An application was afterwards made for the appointment of a settling day. The application was opposed on the ground that the company had been got up fraudulently. The committee, after a very long investigation, came to the conclusion that the allegations of fraud had not been proved, and they appointed the 28th of December, 1881, as the settling day. According to *Ward's* evidence *Bebro* failed to supply him with the funds necessary to pay for the shares, and *Ward* was consequently unable to fulfil his contracts with *Harris, Goldsmid, & Co.*, and was declared a defaulter on the *Stock Exchange* on the 30th of December, 1881, and on the same day the official assignee closed all *Ward's* transactions on the *Stock Exchange*, in accordance with the rules, and distributed such assets as he obtained in this way among *Ward's Stock Exchange* creditors, but the assets collected were of a very trifling amount. The debtor's

summons was issued by *Harris, Goldsmid, & Co.* in respect of the amount due to them by *Ward* on the purchases of the *Quartz Hill* shares. A meeting of his *Stock Exchange* creditors had previously given their consent to the institution of the proceedings in bankruptcy. *Ward* alleged that the appointment of the settling day had been obtained by fraud, and also that some of the members of the *Stock Exchange* committee who took part in appointing the settling day had themselves an interest in the matter.

Yelverton (*Cohen*, Q.C., with him), for the Appellant:—

The debt of the Respondents has been discharged by reason of their taking part in the distribution made by the official assignee of the *Stock Exchange*.

The settling day was not properly appointed, and therefore the contract to buy shares is not binding. The appointment was obtained by fraud; the company was fraudulently got up, and the committee in fixing the settling day were either deceived as to the real nature of the company, or they were themselves acting improperly. Fraud vitiates the most solemn transactions: *Duchess of Kingston's Case* (1); *Smith's* Leading Cases (2).

And some of the members of the committee had themselves an interest in the matter, and were, therefore, disqualified from taking part in the appointment of a settling day, which was a *quasi*-judicial act.

The Appellant has at any rate reasonable grounds of defence to an action, and he ought not to be required to give security.

Winslow, Q.C., and *J. E. Linklater*, for *Harris, Goldsmid, & Co.*, were not heard.

JESSEL, M.R.:—

There is really, in my opinion, nothing in the appeal. The debt is due from Mr. *Ward* as broker, he being, according to the rules of the *Stock Exchange*, liable as principal to the jobbers to whom it is due.

Then it is suggested that the debt accrued by reason of a settling day being fixed, the transaction being in the shares of a

(1) 20 State Trials (Howell's ed.) 355, 544. (2) 8th Ed. vol. ii. pp. 785, 794.

C. A. 1882 *Ex parte* WARD. *In re* WARD. Jessel, M.R.

new company, and therefore contingent on the appointment of a special settling day. A special settling day was fixed, and therefore the condition was complied with. But it is said that the fixing of the settling day was obtained by fraud. First, it was said the company began in fraud. I will assume for the present purpose that it did, although I have not gone through the evidence, and therefore I have no right to give any opinion about it. But I have not heard any evidence that the appointment of the settling day was obtained by fraud. According to the evidence the committee investigated the matter at great length, held several meetings, examined a great many witnesses, and then came to a conclusion. It is suggested that one side presented a case of fraud, that the other side contradicted it, and that the committee did not think it proved. That does not shew that the appointment of the settling day was obtained by fraud. But, even if the appointment was obtained by fraud, it does not appear to me that that could affect the rights of the jobbers, unless they were parties to the fraud or actors in it, and there is not a particle of evidence to shew that they were. Even supposing there was a fraud practised on the committee so that they were deceived, or supposing, which is an extravagant supposition, that the committee themselves were parties to the fraud, this would not affect the rights of outside members, like the jobbers in question in the present case, if they had nothing to do with the fraud. The bargain would still be good so far as they are concerned. They cannot tell what goes on in the committee-room, they do not know how the appointment of the settling day is obtained, and they could not carry on their business on any other terms.

Then a suggestion was made that the committee are acting as judges, and if judges who have an interest in the matter in dispute take part in a decision, that decision is void. The answer is that the committee are not acting as judges. It is perfectly well known that members of the committee may have an interest in the matters which are in question before them, and those members of the committee who are not interested in any particular matter know pretty well who are interested. But they are not judges. They are elected members of the *Stock Exchange*, and it is thoroughly understood in all cases that the mere fact of their

having an interest does not disqualify them from taking part in a decision, though the fact that some members have an interest may put the other members of the committee on their guard as to how far the opinion of those members who have an interest is to be considered.

Lastly, it was said that, because, according to the rules of the *Stock Exchange*, when a member is declared a defaulter the official assignee closes his accounts, gets in all the sums due to him on that premature closing (for it is not the regular closing), and distributes what he so receives among his creditors (not only his *Stock Exchange* creditors but his outside creditors if they choose to come in), this releases the defaulter. Why it should do so I cannot imagine. None of the rules says that it shall release him, and there is no accord and satisfaction. The assignee pays a less sum than the amount of the debts, and to the extent to which he pays, it is a payment of the debts. If a creditor receives a sum of money out of the *Stock Exchange* assets he is paid to that extent, and to that extent the debtor is discharged, but I can see no ground for saying that the debt is got rid of altogether.

Then it is said there is a rule which prevents the *Stock Exchange* creditors from suing the defaulter at law, without certain assents. The first answer is that the respondents have in fact got the assent of the creditors. But if they had not, it does not appear to me that that would destroy the debt. Consequently I should have said that there is no question to be tried, and *à fortiori*, if an issue is to be tried, there can be no ground for saying that the debtor is not to give security for the debt.

On that point the law seems to be perfectly well settled by two cases to which I will refer. In *Ex parte Wood* (1), Lord Justice *Turner* said this (2): "I think that the 79th section of the statute"—that is, the *Bankruptcy Act* of 1849, but it is in substance the same thing as the present Act—" gives power to the Court to require sureties, but in terms vesting in the Court a discretion as to whether the case is one requiring sureties to be given or not,—a discretion to be exercised, not merely with reference to the solvency or insolvency of the alleged debtor, his capacity or incapacity to answer the debt, but with reference to all the

(1) 4 D. M. & G. 875. (2) 4 D. M. & G. 880.

C. A. 1882 *Ex parte* WARD. *In re* WARD. Jessel, M.R.

circumstances of the case, the nature, origin, and constitution of the alleged debt, and the probability of an action to recover it resulting or not resulting in a successful termination."

The same point came before the Court of Appeal in *Ex parte Wier* (1), and the late Lord Justice *James* said this (2): "The Registrar ought to have had regard not merely to *Wier's* solvency, but to the prospect of *Tucker's* success in an action." And Lord Justice *Mellish* said: "I am of the same opinion. In determining whether security should be given, the Registrar ought not only to consider the solvency of the alleged debtor, but also what is the probability that the claimant will be able to establish a debt. If the probability is that there is a good defence, security ought not to be required. Here it is, at least, very doubtful whether an action could be maintained." Applying those observations to this case, it being, in my opinion, perfectly clear that there is no defence to an action, that is quite sufficient reason for requiring security. In my opinion, therefore, this appeal must be dismissed.

COTTON, L.J.:—

I am of the same opinion. Mr. *Yelverton* has urged everything which could be urged on behalf of his client, but he could not make a successful argument without the materials for so doing. The only point is, whether there is reasonable ground for supposing that the defence to the action would be successful. I cannot see that there is. The only possible grounds of defence suggested seem to be two. The contract with the Respondents was subject to a condition that a settling day should be appointed, and a settling day has in fact been fixed by the committee of the *Stock Exchange*, and the suggested defence is this, that it must be considered as no settling day as between the parties, because the appointment was obtained by fraud.

It was attempted to shew that the settling day was obtained by fraud, because the company was got up by fraud. That, however, would not shew that the settling day had been obtained by fraud. I do not go into the question whether there is any evidence that the settling day was obtained by fraud upon the committee or on the part of the committee who granted it,

(1) Law Rep. 7 Ch. 319. (2) Law Rep. 7 Ch. 322.

because, in my opinion, even if that were made out (I do not suggest for one moment that there is any evidence in support of the suggestion) it would be immaterial as between the two contending parties, Messrs. *Harris, Goldsmid, & Co.*, and Mr. *Ward*, unless it was shewn that Messrs. *Harris, Goldsmid, & Co.* were actors in the fraud, and that therefore the settling day, as between them and Mr. *Ward*, could be disregarded. There is no evidence at all that they had anything to do with the fraud, if there was a fraud, except a suggestion that they suspected it, and asked that a settling day might not be granted. There is not a suggestion that they knew of the only fraud which would be material as to the settling day, and, in my opinion, we ought not to consider that ground of defence as affording any prospect of success on the part of Mr. *Ward*.

Then the only other substantial point was, that, under the rules of the *Stock Exchange*, a private fund is constituted in order to pay the debts of defaulters, and that this precludes the Respondents from proceeding against their debtor in any other way. There is no evidence of any such rule. There is a House Fund which will provide, among other things, for the payment of the claim of the Respondents so far as the fund will extend. So far as they are paid in this way they are paid, but, the fund being insufficient to pay them in full, they are seeking their remedy in the ordinary course against the ordinary assets of their debtor. The only provision in the rules which I can see to be applicable is that they cannot take proceedings in the ordinary tribunals without the leave of the creditors, but that assent has been obtained at a meeting called for the purpose. In my opinion, there is no reasonable ground for suggesting that the Appellant has any good defence to an action.

LINDLEY, L.J.:—

I am of the same opinion. I shall confine my remarks to the question about the appointment of a settling day. The contract between the Appellant and the Respondents was contingent on the appointment of a special settling day. A special settling day was appointed; therefore the contingency happened. The argument is that the appointment of the settling day was procured by

C. A. 1882 *Ex parte* WARD. *In re* WARD. Lindley, L.J.

fraud, and that it ought therefore to be treated as no settling day at all. This seems to be the old fallacy which was exposed long ago in *White* v. *Garden* (1). Fraud, no doubt, vitiates everything in a sense, but the doctrine cannot be carried to the extent to which Mr. *Yelverton* asks us to carry it. To avail himself of it he must shew that Messrs. *Harris, Goldsmid, & Co.* were parties to the fraud, and of that there is no evidence, or any trace of it. There is no evidence that the settling day was procured by fraud, that is, by any trickery on the committee; there is no evidence to shew that they were deceived, or cheated, or bribed. The fraud alleged is of a totally different kind. The getting up of the company may have been as fraudulent as Mr. *Yelverton* says it was, but there is no evidence of any fraud on the *Stock Exchange* Committee, and still less that Messrs. *Harris, Goldsmid, & Co.* were parties or privies to it in any way; and unless the case can be carried to that length, there is no defence to the claim of the Respondents. But, as they have not objected to giving Mr. *Ward* an opportunity of making what he can of his defence on the terms of his bringing £6623 into Court, we need not trouble ourselves about that. As to the other points raised, there is still less in them.

Solicitor for Appellant: *L. Rawlins.*
Solicitors for Respondents: *Travers Smith & Braithwaite.*

(1) 10 C. B. 919.

W. L. C

In re MARTIN.
HUNT *v.* CHAMBERS.

[1881 M. 3449.]

C. A.
1882
V.-C. B.
March 18.
C. A.
April 19.

Practice—Trial—Right to Trial by Jury—Discretion of Court to direct Trial without a Jury—Rules of Court, 1875, *Order* XXXVI., *rr.* 3, 26—*Appeal from Discretion of Judge.*

Either party to an action has an absolute right under Order XXXVI., rule 3, to have the action or the issues tried before a jury, without assigning any reasons, unless it shall appear to the Judge that there are special grounds rendering it desirable to try the action before a Judge without a jury; the *onus* in such cases being on the party who desires it not to be tried before a jury.

Bacon, V.C., having made an order under Order XXXVI., rule 26, that the issues in an action should be tried before himself without a jury, on the ground that no sufficient reason had been shewn for its being tried by a jury:—

Held, on appeal, that the Judge having placed the *onus* of proof on the wrong party, had not exercised his discretion in accordance with the rule, and the Court overruled his decision.

Semble, even if the Judge exercises his discretion in accordance with the rule his decision is subject to appeal, though the Court will not interfere with his discretion except in a very strong case.

Where the whole case is a proper one to be tried by a jury, it is the more convenient practice to transfer the action altogether to the Queen's Bench Division.

Ruston v. *Tobin* (1) commented on.

THE action in this case was brought by *R. Hunt* on behalf of himself and all other creditors of *George Martin*, deceased, against the executors and the devisees of his real estate, claiming payment of what was due to him from the testator and, in the event of the Defendants not admitting sufficient assets, for the administration of the real and personal estate of the testator.

The Plaintiff was the landlord of a farm held by the testator, and the claim was for rent in arrear and for damages for not keeping the premises in repair, and for farming the land in an improper manner.

The Defendants in their defence denied the Plaintiff's claim,

(1) 10 Ch. D. 558.

C. A. 1882 *In re* MARTIN. HUNT *v.* CHAMBERS.

but admitted assets sufficient to satisfy his demand. The nature of the issues of fact between the parties are stated in the judgment of the Vice-Chancellor.

On the 13th of February, 1882, the Defendants gave notice of their desire to have the issues of fact tried before a Judge and jury. The cause was accordingly set down to be tried in *Middlesex*.

The Defendants then took out a summons to settle proper issues of fact, and that such issues might be tried before a Judge and jury at *Hertford*, instead of in *Middlesex*.

The summons was adjourned into Court, and the Plaintiff at the same time made a cross motion that notwithstanding the notice of the 13th of February, the action might be tried before a Judge without a jury. The summons was heard before Vice-Chancellor *Bacon* on the 18th of March, 1882.

Horton Smith, Q.C., and *T. L. Wilkinson*, for the Defendants.

Millar, Q.C., and *C. S. Eady*, for the Plaintiff.

BACON, V.C.:—

I can do nothing with this. The rules are meant to be, and are, sufficiently clear and distinct. Their object, among other things, was not to encourage that kind of special pleading and chicanery, which was most unsatisfactory to the Court and most injurious to the public. The rules are plain. Rule 3 enables the defendant to say whether he would like to have a trial by jury or not subject to the discretion vested in the Court, a discretion not to be lightly exercised, and not to take away rights which the previous clauses had given to defendant, nor, I need not say, to do anything that is unjust. It is said there are questions of fact which ought to be tried before a jury in preference to a trial in this Court. I asked what those issues of fact were. The answer ought to have been prompt, because a defendant who wants issues of fact between himself and the plaintiff tried before a jury must know them perfectly well, and ought to be under no difficulty in giving a prompt answer to such a question. I am able to pick them out from the Defendant's affidavit, and I understand, as appeared

from the very clear statement which Mr. *Horton Smith* read to me, that the issues were these: first, whether, as a matter of law, *Martin's* son, who succeeded to the possession, was bound by *Martin's* agreement? That is a question of law. The next issue is whether the late Mr. *Martin* having been in occupation, he occupied as an ordinary tenant or as a tenant obliged to conform to the custom of the country. Any question as to the custom of the country is a question of law, and that is to be ascertained. The other issues are too trifling to talk about. The six guineas and the rent which has been paid into Court there is no dispute about, and there is no question of fact to be tried as to that. This, therefore, being a case in which the law is more important than the facts, I think I should neglect my duty if I hesitated to proceed under rule 26, and to say that the attempt to have this plain case—because it will be plain when it comes before the Court—tried before a jury fails. The parties would be incurring the expense of summoning a jury and summoning the witnesses to attend in Court in a case where there is not the least necessity for it. I have listened in vain for any reason why there should be a trial before a jury. No answer whatever has been given to the inquiries I have made, and I am asked now to act, as I am bound to act, under rule 26. That this is such a cause I do not hesitate to say. I have heard no reason, I repeat, why the matter should be submitted to a jury. The expense which that would entail upon the parties, whoever has to pay it, would be most considerable. One gentleman says there are numerous witnesses who live in the neighbourhood of *Hertford*, but he does not mention the name of one nor state the number of what he calls "numerous witnesses." There is no reason before me that I can attend to why there should be a trial before a jury. There is a reason why the mixed questions of law and fact should be tried in this Court, and therefore I dismiss this summons with costs.

F. G. A. W.

From this order the Defendants appealed. The appeal was heard on the 19th of April, 1882. C. A.

C. A.
1882
In re MARTIN.
HUNT
v.
CHAMBERS.

Horton Smith, Q.C., and *T. L. Wilkinson*, for the Appellants:—

We have admitted assets, and this is now a mere Common Law action. The questions at issue are all questions of fact. Having given notice of our desire to have the issues tried by a jury, we have an absolute right, under Order XXXVI., rule 3, to a jury, unless the Judge sees some special reasons to the contrary. The form of our notice was regular: *Powell* v. *Williams* (1). With respect to the venue, *Hertford* is in many respects more convenient than *London*: *Wood and Ivery* v. *Hamblet* (2).

[They were stopped by the Court.]

Millar, Q.C., and *C. S. Eady*, for the Plaintiff:—

The action was originally properly a Chancery action. It might be necessary to come upon the real estate and to have accounts taken. The fact of the Defendants admitting assets does not convert it into a Common Law action. The appeal will not be entertained from the exercise by a Judge of his discretion which has been given him by the rules, except in a very strong case: *Ruston* v. *Tobin* (3); *Swindell* v. *Birmingham Syndicate* (4); *Watson* v. *Rodwell* (5). At all events, now that the Judge has exercised his discretion, the *onus* is on the Appellants to shew that the case ought to be tried by a jury. There are questions of law as well as of fact, and if the questions were entirely of fact the Judge could deal with them as conveniently as a jury: *Bordier* v. *Burrell* (6); *Brooke* v. *Wigg* (7); *Wedderburn* v. *Pickering* (8).

JESSEL, M.R.:—

The question we have to consider is, first of all, what is the meaning of the rules. Now I think that is settled. The rules mean that either party giving notice of trial by a jury is entitled to have his case tried by a jury unless there is some reason to the contrary.

(1) 12 Ch. D. 234.
(2) 6 Ch. D. 113.
(3) 10 Ch. D. 558.
(4) 3 Ch. D. 127.
(5) 3 Ch. D. 380.
(6) 5 Ch. D. 512.
(7) 8 Ch. D. 510.
(8) 13 Ch. D. 769.

Under the 26th rule of Order XXXVI., the Court may, in any case in which the cause could, before the passing of the *Judicature Act*, without the consent of the parties, be tried without a jury, order it to be tried without a jury. The words are, "if it shall appear desirable," which, as I said before, means that there is some reason for depriving the party requiring a jury of his right to have it tried before a jury. That I think is the settled rule as to these questions of trial by jury.

Then the next point to be considered is in what cases does the Court interfere with the discretion of a Judge who has directed a case to be tried either with or without a jury. He having that discretion, I take it there must be a plain and clear case to justify the Court of Appeal in interfering, for, as a general rule, the Court does not interfere with the exercise of the discretion of the Judge. There must be some special reason to induce it to do so. And here I wish to make an observation about the judgment of the late Lord Justice *James* in *Ruston* v. *Tobin* (1). I am satisfied that whether his words there are correctly reported or not, he did not intend to decide (I was sitting with him at the time, and I know there was no difference of opinion between us) that in no case should the Court interfere, and I am sure he did not intend to overrule or interfere with his own decision in *Golding* v. *Wharton Saltworks Company* (2), in which he said the Court would interfere if there was serious injustice. In addition to that there is another remark by Lord Justice *James* in that case of *Ruston* v. *Tobin* with regard to another case in which the Court will interfere, and that is where the discretion has been exercised in a particular way in consequence of an opinion on a point of law which the Court of Appeal thinks to be a wrong opinion. Now, it appears to me, after having read the judgment of the Vice-Chancellor three or four times, that this is exactly that case—that he exercised his discretion in consequence of an opinion on a point of law which I think to be wrong. It seems to me clear that he decided that there was no sufficient reason shewn why there should be a trial by a jury, and that he never decided the case on any other ground; that is, he did not say it could not be tried by a jury, or that it could not be conveniently tried by a jury.

(1) 10 Ch. D. 558, 565. (2) 1 Q. B. D. 374.

C. A.
1882
In re MARTIN.
HUNT *v.* CHAMBERS.
Jessel, M.R.

In order to shew that I think I should read the judgment of the Vice-Chancellor on this point, because he repeats it three times. First he says, "This, therefore, being a case in which the law is more important than the facts." I must say I cannot find that question of law; it may be my fault, but I do not see any question of law. There is a question of fact, and like all questions of fact, it may depend partly on actual evidence of fact, and partly on inferences to be drawn from the evidence. [His Lordship then referred to the issues as stated in the Vice-Chancellor's judgment, and continued:—] All these are questions of fact. But however that may be, assume I am wrong, and that I ought to be able to find this question of law, still the Vice-Chancellor admits that it is a very plain case, not that there are difficult points of law, but that it is plain; therefore the Judge can without difficulty lay the case before the jury.

Then the Vice-Chancellor says: "I think I should neglect my duty if I hesitated to proceed under the 26th rule, and to say that the attempt to have this plain case, because it will be plain when it comes before the Court, tried before a jury fails. The parties would be incurring the expense of summoning a jury and summoning the witnesses to attend in Court in a case where there is not the least necessity for it. I have listened in vain for any reason why there should be a trial before a jury. No answer whatever has been given to the inquiries I have made, and I am now asked to act as I am bound to act under rule 26." Then he says: "That this is such a case I do not hesitate to say. I have heard no reason, I repeat, why the matter should be submitted to a jury." That is the second time he says it. Then he speaks of the expense to the parties, and then he winds up in this way: "There is no reason before me that I can attend to why there should be a trial before a jury. There is a reason why the mixed question of law and fact should be tried in this Court."

Therefore, three times over he puts it, on the ground that there is no reason shewn to him for a trial before a jury. As I have already said, it appears to me that that is not a correct opinion. It is for the party who says there shall not be a trial before a jury to shew a reason why it cannot be so tried, and I am fully aware that Mr. *Millar* did his best to shew some reason, but as I

have already said, juries try cases of much more difficulty and much more complexity and intricacy than the simple question whether a farmer holds a farm on the terms of a particular agreement or merely on the ordinary terms of tenant from year to year, which is the main issue here.

Therefore, it does appear to me that the learned Judge has come to his conclusion and has exercised his discretion for a reason not well founded in law, and, therefore, that his exercise of discretion is not one of those exercises of discretion which come within the general rule that the Court of Appeal will not interfere.

I am not at all prepared to say that I should not think this is so plain a case that we ought to interfere, even if we had not found that. But it is not necessary to say so on the present occasion because the point does not arise. But having regard to a recent case before the Court of Appeal at *Westminster*, I am by no means prepared to say that in a plain case, the mere fact of a Judge saying (without giving any reason for it) that it is more convenient to try it before a Judge than a jury is sufficient ground for the Court of Appeal to decline to interfere.

This is one of those cases which, in my opinion, can be tried equally well by a Judge and jury as by a Judge alone, and I am of opinion that, that being so, the case should be tried by a jury. Then how is it to be tried? In the first place, it has been found in recent years more convenient when the action is to be tried by a jury to transfer it to the Common Law Division. There are various reasons for that. In the first place, it is more convenient for the solicitors, especially large firms who have separate clerks for Common Law and Chancery business. In the next place, there are a number of little applications with respect to jury trials with which the Masters and the Common Law Judges in Chambers are familiar but with which the Chancery Chief Clerks and the Chancery Judges at Chambers are not familiar, and they are more conveniently dealt with therefore in the Common Law Division. Then again, there is the taxation of costs in trials before juries—the costs should be taxed by people most familiar with that mode of trial. And the Masters of the Supreme Court are more familiar with it than the Chancery Taxing Masters.

C. A. 1882 — *In re* MARTIN. HUNT *v.* CHAMBERS. — Jessel, M.R.

Altogether that practice has been found more convenient, and we prefer to follow it.

The only remaining question is as to the mode of transfer. This case was properly kept in the Chancery Division as long as administration was required. But the Defendants have now admitted assets, and therefore the Plaintiff could only get a decree or judgment for himself, although the suit was brought for all the creditors as well. But I think the Common Law Judges may be embarrassed by the form of the action, and therefore it would be better to strike out the words "on behalf of himself and all the other creditors," and to preface the order by the words "the Defendants admitting assets to answer Plaintiff's demand in this suit, and admitting they are personally liable for what may be recovered, if anything, for damages and costs of the action."

There were some costs reserved by one of the orders, and if it is not opposed by the other side it will be convenient to make those costs costs in the action; so that there will be no occasion to go back to the Judge of the Chancery Division, and there is a sum of money in Court which will be taken out by the Plaintiff without prejudice to any question. Then, when we have once transferred the action there will be nothing left in this division at all.

The only remaining point to be considered is the costs of the application to the Court below and before us. There seems to have been a considerable amount of mistake, miscarriage, accident, wrangling, and misunderstanding in this case. I think justice will best be done by letting the costs be costs in the action both here and below, so that the party who wins the action will eventually get the costs.

COTTON, L.J.:—

The first question in this case is as to the true construction of rules 3 and 26 of Order XXXVI. That, I think, is clear. Under rule 3 the party who gives notice that he desires the case to be tried by a jury has a right to have it so tried, subject nevertheless to rule 26, which applies to an action like this, which was properly instituted in the Chancery Division. What is rule 26? It is this. The Judge, notwithstanding the notice, has a dis-

cretion to order the action to be tried without a jury "if it shall appear to him desirable." In my opinion it is tolerably clear that under this rule the Judge ought, before making an order depriving the party who has given notice of that which is his right, namely, to have the action tried before a jury, to be satisfied that there are reasons why the case should not be tried before a jury, and that the order ought not to be made merely because trial before a jury will be a more expensive mode of trial, or because there is no sufficient reason for trying it before a jury. The party has the right without reason assigned to have it tried before a jury, subject only to this power given to the Judge to make an order depriving the party giving the notice of his right, if, in his discretion, he sees there are reasons other than mere expense for having it tried before the Judge alone.

But here it was said that a main or a principal difficulty in this case was that the Vice-Chancellor had exercised his discretion. Now I have often said (and that was the meaning, I have no doubt, of what was said by Lord Justice *James*), that the Court of Appeal should be exceedingly slow to interfere with the exercise of discretion by the Judge in the Court below; not that the exercise of discretion is not appealable, but that when the discretion has been exercised on proper lines, that is, exercised in accordance with the rule laid down as to the exercise of discretion either by Act of Parliament or the orders—when discretion has been exercised in that way, the Court of Appeal is very slow to interfere. And here my doubt was whether the Vice-Chancellor had not come to the conclusion that in his opinion on the facts in this case it would be more convenient that the action should be tried before the Judge and not by a jury. However, on reading his judgment, I think that was not the view on which he proceeded. Because he does say, in two or three passages of his judgment which were read by the Master of the Rolls, that there has no sufficient reason been shewn why this should be tried by a jury. The order gives the party a right to have the action so tried unless there is a reason against its being so tried, and as that is so, I cannot regard the Vice-Chancellor as having exercised a discretion in accordance with the rule laid down by the Orders for the exercise of his discretion. That is a case in which the Court of Appeal

C. A. 1882 *In re* MARTIN. HUNT *v.* CHAMBERS. Cotton, L.J.

always must exercise its own discretion, because the Judge of the Court below has not, in the proper sense of the word, exercised the discretion given to him. He has exercised a discretion, but not the discretion given to him by the Orders in this case.

That being so, there being no sufficient reason why this should not be left to be tried by a Judge and jury according to the notice given, in my opinion this case ought to go to a jury; and in these circumstances it will save expense not to let the matter come back here again, but to transfer the whole case to the Queen's Bench Division, and let the Division which deals with the case when it is tried before a Judge and jury entirely dispose of it, there being nothing except the questions of law which may arise to render it in any way necessary that the matter should come back to the Chancery Division, and those questions of law being questions which will be just as well disposed of by the Queen's Bench Division.

I agree, therefore, with the order which has been pronounced.

LINDLEY, L.J. :—

I am of the same opinion. Having read with care the judgment of the Vice-Chancellor, I have come to the conclusion that although he exercised his discretion in one sense he did so upon an erroneous view as to the party upon whom the burden of proof lay. He seems to me to have considered (in fact his judgment admits of no other construction) that the burden lay upon the Defendants of shewing some good reason why this case should be tried before a jury. It appears to me that was an error, and an error which has affected the whole of his view; the Defendants having the right, under rule 3 of Order XXXVI., to have a case of this kind tried by a jury, unless it should appear desirable under rule 26 in the same Order to have the case tried without a jury. I think we ought to review this exercise of his discretion. If the Vice-Chancellor had not been under the misapprehension as to the burden of proof, I should have been extremely reluctant to have differed from him, and in this case, which appears to me to be one equally capable of being tried one way or the other, I certainly should not have given my voice for dissenting from his judgment. However, I am satisfied that he did not exercise his

discretion except upon an erroneous view as to the burden of proof; and I think the Defendants are entitled, on the true construction of the rules, to have this case tried by a jury, unless there are sufficient reasons for directing a trial without a jury.

I confess I do not see any reason for trying this case without a jury or for trying it with a jury. The rule has given the Defendants the right to have it tried with a jury, and unless there are sufficient reasons for depriving them of that right the rule must have effect, and it seems to me impossible to deprive the Defendants of the right they have under that third rule.

That being the case, my own experience enables me to say that it does save a great deal of expense if there is to be a trial by jury to transfer the whole action to the Queen's Bench Division, except, of course, in cases where it is necessary to come back to the Chancery Division to work out the judgment which is obtained. In this particular case there is no necessity of the kind, for the Defendants have admitted assets, that is to say, they have admitted their own personal liability to pay what, if anything, the Plaintiff may succeed in recovering. There is no reason to come back to get the land at all. If the Plaintiff recovers he will get judgment against the Defendants, and *fi. fas.* and *elegits* against their personal effects and land, if they have any. In short, he will get complete relief.

The difficulty as to the money in Court has been got rid of, by ordering it to be paid to the Plaintiff, without prejudice to any question. The difficulty as to costs has been got rid of, because the order is to apply to the costs of the order of the 21st of December, 1881, so that all the costs will be costs in the action. Under the circumstances the Plaintiff will either succeed or fail. If he succeeds he will get judgment with the usual right of issuing execution, and if he fails he will have the satisfaction of paying the costs. There is no reason for coming back to the Chancery Division in any possible event that I can see.

Solicitors: *Monckton, Long, & Gardiner*, agents for *R. Skeet, Bishops Stortford; Rooks & Co.*, agents for *Richardsons & Foxwell, Much Hadham.*

M. W.

V.-C. H.
1881
Dec. 21.

In re CAMBRIAN MINING COMPANY.

Practice—Examination of Witness under Companies Act, 1862 (25 & 26 *Vict.* c. 89), s. 115 [*Revised Ed. Statutes, vol. xiv., p.* 227]—*Presence of Counsel and Solicitor on behalf of Person summoned for Examination—Right to take and carry away Notes—Re-examination.*

A person summoned for the purpose of being examined under the *Companies Act*, 1862, s. 115, is entitled to have counsel and solicitor on his behalf present during his examination, and to be re-examined for the purpose of explaining his examination-in-chief, but the re-examination must be limited to that purpose; and his counsel and solicitor are entitled to take and carry away notes of the examination, but only to use such notes for the purpose of the re-examination.

IN the course of the liquidation of the *Cambrian Mining Company*, a summons was taken out by the liquidator for the attendance before a special examiner of a Mr. *Fell*, for the purpose of being examined under the 115th section of the *Companies Act*, 1862.

Mr. *Fell* duly attended, and after having been partially examined refused to answer any further questions until the following points taken for him by his solicitor had been determined:—

1. Whether he was entitled to have counsel and solicitor on his behalf present at his examination.

2. Whether such counsel and solicitor were entitled to take notes during his examination.

3. Whether they were entitled to carry away such notes from time to time until the examination was completed.

4. Whether he was entitled to be re-examined by his own counsel or solicitor.

The special examiner made a certificate to the foregoing effect, and a motion was now made on behalf of the liquidator for an order that Mr. *Fell* might attend at his own expense forthwith before the special examiner, and might pay the cost of the proceedings on the day he refused to answer.

W. Pearson, Q.C., and *Ingle Joyce*, for the liquidator, in support of the motion:—

We admit that a person being examined under the 115th section

is entitled to have his solicitor and counsel present during his examination. This, and nothing more, was decided in *In re Breech-loading Armoury Company* (1), and the head-note in those cases goes too far, for such counsel and solicitor are not entitled to take notes of the examination, nor in any way to interfere in the proceedings; and the deponent is not entitled to be re-examined. The object of the section is to get out information as to the affairs and dealings of the company which may be of service to the liquidator in the performance of his duties, and it is obvious that if the person under examination was at liberty to have notes of his examination taken and carried away they might be shewn to other persons about to be examined, and that object might be defeated. The 115th section is analogous to the 96th section of the *Bankruptcy Act*, 1869, under which no counsel or solicitor on behalf of a witness is ever allowed to take notes or interfere in the examination or to re-examine. The person examined under sect. 115 is in fact for no purpose in a better position than a witness at *nisi prius*, on whose behalf solicitor or counsel would have no *locus standi* at all.

[They referred to *Ex parte Parsons* (2), *Clement's Case* (3), *In re Gold Company* (4), and *In re Silkstone and Dodworth Coal and Iron Company* (5).]

Grosvenor Woods, for Mr. *Fell*:—

Ever since 1867, when the cases of the *Breech-loading Armoury Company* and the *Merchants' Company* were decided, it has been the practice, in accordance with Lord *Romilly's* decisions therein, for counsel and solicitor not only to attend on behalf of a person examined before an examiner under sect. 115, but also to take notes of the examination and to re-examine the deponent; and now the Court is asked to overrule those decisions and entirely to alter this long-subsisting practice, upon the same arguments that were unsuccessfully used in those cases.

The cases cited on behalf of the liquidator have no application to the present question, and if the counsel and solicitor, who, it

(1) Law Rep. 4 Eq. 453.
(2) 1 Atk. 204.
(3) Law Rep. 13 Eq. 179, n.
(4) 12 Ch. D. 77.
(5) 19 Ch. D. 118.

V.-C. H. 1881 *In re* Cambrian Mining Company.

is admitted, may be present for the protection of the witness, could neither take notes nor re-examine, nor interfere in any way in the examination, their presence would be unmeaning and useless.

The argument that the notes taken might be communicated to other persons does not apply here, because the case against Mr. *Fell* is peculiar to himself, and there could not be any disclosures which would do harm.

[He referred to *In re Western of Canada Oil, Lands, and Works Company* (1).]

W. Pearson, in reply.

Hall, V.C.:—

The examiner in this case has sent to me a statement of what took place, and of his ruling upon the matter. Whether or not the person called for the purpose of being examined could properly object to the examination proceeding until the questions raised were settled so that he might know what he was about, I do not think it necessary for me to determine; because the examiner thought, in the existing state of things, that it was proper that these matters should be brought before and dealt with by the Court, and I propose to deal with them accordingly.

Now, it does not seem to be disputed that solicitor and counsel are entitled to be present; and the object of their being present is at least in order to protect the witness, and advise him whether or not he is bound to answer, and also probably to draw his attention to any statement in the course of the examination as to which explanation may be desirable, or to different portions of the evidence actually given for the purpose of making the evidence which the deponent actually signs, upon the whole and taken altogether, a fair and proper representation of his evidence on the matters as to which he is examined. For the purpose of enabling the witness to give that explanation, it seems to me to be essential and necessary that he or somebody for him—his counsel or solicitor present—should be at liberty to take notes, or rather, as you cannot prevent him taking notes, to take notes to be used for a particular purpose.

(1) 6 Ch. D. 109.

As regards the question of re-examination, whatever may have been the practice with reference thereto, it seems to me that re-examination would only be properly and reasonably allowed for the particular purpose of explaining the evidence given by the deponent during his examination on behalf of the liquidator,—that it ought to be confined and limited to that particular purpose, and that it would be quite legitimate only when so confined. And in fact such a re-examination is only the giving of the explanations which it is not disputed that the deponent ought to be at liberty to give on the evidence being read over to him. I therefore hold that the re-examination is proper when so limited and confined, but that the examiner in allowing re-examination should attend to that object.

As regards the taking away of the notes, I do not at present attach very much importance to that; because it seems that after all is completed, the deponent might, upon a proper application, be entitled at all events to have a copy of the depositions, as a whole; but I do not see that taking away a copy of the notes while the examination is going on could answer any good purpose; and certainly if any use were made of those notes, such as it has been suggested might be made, the witness would in my judgment be availing himself of the notes for an improper purpose. At the same time, to say that he is not to be at liberty actually to take them away, I think would be going too far. I think he is to be at liberty to take notes for the purpose of assisting himself, his counsel and solicitor, in the re-examination, limited to such an extent and for such a purpose as I have mentioned.

It seems to me that what I ought now to do under the circumstances is to send the matter back to the examiner, ordering this gentleman to attend and go on with the examination, at which he is to be at liberty to take and carry away notes, using them only however for the purpose of enabling him to be re-examined, and that he is to be entitled to be re-examined, the re-examination being confined and limited to eliciting from him such evidence as may be reasonably offered for the purpose of explaining the evidence he may have given on examination on behalf of the liquidator.

V.-C. H. 1881 — *In re* CAMBRIAN MINING COMPANY.

I shall not under the circumstances make the witness pay the costs of this application, and I shall make no order as to his costs.

Solicitors: *Linklater & Co.; Gregory & Co.*

W. W. K.

V.-C. H. 1882 — *Jan.* 23, 24, 25; *Feb.* 6.

NICHOLLS *v.* MITFORD.

[1880 N. 549.]

*Common—Inclosure of Waste Lands of Manor—*29 *Geo.* 2, *c.* 36 [*Revised Ed. Statutes, vol. ii., p.* 617]*—Agreement between Lord and Tenants under—Right of Common of Pasture—Freehold Tenants with right of Property in Underwood.*

In the year 1769 the lord of a manor, the freehold tenants of which were not only entitled to common of pasture, but were also collectively the owners of the bushes and underwoods growing on the wastes of the manor, entered into an agreement, under 29 Geo. 2, c. 36, with the major part of such tenants for the periodical inclosure of parts of the wastes of the manor for the growth and preservation of timber and underwood; and this agreement appeared to have been from time to time acted upon from the year 1773 until, in the year 1880, two of the freehold tenants of the manor brought an action on behalf of themselves and all other the freehold tenants against the lord of the manor to restrain him from further infringement of their rights:—

Held, in a special case stated in that action, that the Act of 29 Geo. 2, c. 36, applied only to agreements by persons entitled to common of pasture, and not to agreements by persons who were the owners of the bushes and underwood; that the agreement of 1769 was inoperative against such owners; and that the lord had no right to inclose as against them.

SPECIAL CASE.

This was a special case stated for the opinion of the Court in an action by the Plaintiffs on behalf of themselves and all other the freehold tenants of the manor of *Bedham*, in the county of *Sussex*, against the lord of that manor for damages for the infringement and disturbance of the Plaintiffs' rights of pasture and rights to the underwoods and bushes growing on the wastes of the manor, and for an injunction to restrain any further infringement or disturbance of such rights or any of them.

The questions to be determined in the action related to the

right of the Defendant, as lord of the manor, by virtue of the Act 29 Geo. 2, c. 36, and of an agreement under that Act executed in 1769, to keep inclosed, and from time to time to reinclose, certain commonable wood grounds forming portions of the wastes of the manor (formerly inclosed under the above-mentioned Act and agreement), and therein to cut the underwoods, and to account for the proceeds to the tenants, as owners thereof, according to the terms of the agreement, and to exclude the tenants from pasturing their commonable animals, and from cutting the underwoods according to the custom of the manor within such inclosures.

The statements of the case were shortly as follows: The Plaintiffs were each absolute owners of freehold lands held in free and common socage of the manor. The Defendant was the lord of the manor and owner thereof in fee-simple, and as such was the absolute owner of the soil of the wastes thereof and of the timber trees, consisting of oak, ash, elm, beech, and chestnut growing thereon. He was also the owner of about 269 acres of inclosed land within the ambit of the manor, no part of which was waste land.

The Plaintiffs and the other freehold tenants of the manor were, and they and their predecessors in title had been from time immemorial, collectively the owners of all the underwoods and bushes growing on the wastes of the manor, including (subject to the questions arising out of the agreement of 1769) the commonable woods and inclosed waste grounds, and were entitled to take the underwoods in quantities proportioned to their several holdings. And subject to the same questions they were also entitled *inter alia* to the following rights of common appendant and appurtenant to their freehold tenements—namely, (*a*) a right of common of pasture for their horses, cattle, sheep, and swine levant and couchant on their respective tenements, exercisable at all times in the year, over all the wastes of the manor; and (*b*) a right of digging stones, exerciseable over the same wastes, at all times of the year, for their necessary uses upon their tenements.

By the Act 29 Geo. 2, c. 36, it was enacted (in sect. 1) that it should be lawful for the owners of wastes, woods, and pastures, wherein any person or persons had any right of common of pasture, by and with the assent of the major part in number and

V.-C. H. 1882 NICHOLLS v. MITFORD.

value of the owners and occupiers of tenements to which the said right of common of pasture belonged, and for the major part in number or value of the owners and occupiers of such tenements, by and with the assent of the owner or owners of the said wastes, woods, and pastures, to inclose, and keep in severalty for the growth and preservation of timber or underwood, any part of such wastes, woods, and pastures for such time and in such manner and upon such conditions as should be agreed by them respectively; and (in sect. 3) that every agreement for any such inclosure should be in writing and signed by the parties, and should be registered and inrolled as therein specified. By sect. 4 of the Act power was given to persons aggrieved, within six months after registration and inrolment of any agreement under the Act, to appeal to the Quarter Sessions, whose determination should be final; and if there was no appeal, the agreement, so registered and inrolled, was made for ever binding upon all persons whatsoever, without any further or other appeal. The Act was amended by 31 Geo. 2, c. 41, whereby it was in effect provided (*inter alia*) that the acts of persons having only partial interests were not to have effect after the determination of such interests.

The agreement made in pursuance of this Act bore date the 6th of June, 1769. It was made between *William Mitford*, the then lord of the manor, of the one part, and "we whose hands and seals are herewith subscribed and set, owners and occupiers of tenements to which a right of common of pasture in the wastes, woods, and pastures of the said manor doth belong, of the other part;" and it was thereby "assented to and agreed, by and between us whose hands and seals are hereunto subscribed and set, being the said *W. Mitford*, owner of the mannor and of the wasts, woods, and pastures of the mannor . . ." "and the major part in number and value of the owners and occupiers of tenements to which a right of common of pasture in the said wasts, woods, and pastures doth belong: That from and after the date of these presents it shall be lawful for the said *W. Mitford*, his heirs and assigns, owner or owners of the said mannor, at his and their proper costs and charges, at all times hereafter when and so often as any part or parcel of the woods and coppices, lying within the wasts of the said mannor, shall be felled or cut down, to inclose

and keep in severalty, for the growth and preservation of the timber and underwood, all such woods and coppices as aforesaid, for and during the term of sixteen years, to be computed from the time when such woods and coppices shall be so felled, cut down, and inclosed as aforesaid; and also that all such woods and coppices belonging to the said manor as have lately been cut down and are now inclosed shall remain and continue to be so inclosed and kept in severalty by him the said *W. Mitford*, his heirs and assigns, during the said term of sixteen years, to be computed from the time when such woods and coppices were so cut down and inclosed as aforesaid."

And it was also thereby further declared, assented to, and agreed by and between all parties, that during the said term or terms of sixteen years it should not be lawful for any of the parties to those presents, their heirs or assigns, or any other person or persons who then were or thereafter might become owners or occupiers of tenements to which a right of common in the said manor belonged, "to break down any part of the inclosures aforesaid, or to enter by themselves, their servants, cattle or otherwise, into any part of the said woods or coppices that shall be so inclosed, in order to molest or disturb the growth and preservation of the timber and underwood, under any pretence of a right of common or a right to cut bushes there, or any other pretence or right whatsoever."

And in consideration of the premises, *W. Mitford* on his part agreed for himself, his heirs and assigns, owner and owners of the said manor, that all and every such woods and coppices as then were or might thereafter be from time to time so inclosed and kept in severalty as aforesaid, by virtue of the agreement, should, after the expiration of the said term of sixteen years, be cut down and thinned according to the usual custom of the country by his and their workmen and labourers; and that all and every the underwoods which should be so cut down (after reserving such trees and tellows of oak, ash, elm, beech, and chestnut, as the said owner or owners of the manor should from time to time be advised or think proper to leave standing) should be sold in manner therein specified, and the money arising by such sale, after deducting all necessary expenses, should "be paid into the hands of the

V.-C. H. 1882 NICHOLLS v. MITFORD.

said owner or owners of the said manor for the time being, and be by him or them divided amongst all and every the owners and occupiers of tenements in the said manor who have a right of common, in proportion to their several quit-rents payable to the owner of the said manor."

This agreement was duly signed, registered, and inrolled in accordance with the provisions of the Act, and it was carried into execution and appeared to have been acted upon at various times down to the year 1876, as was shewn by numerous presentments by the homage of the manor recorded in the Court rolls, nineteen of which, ranging from the year 1773 downwards, were stated in the special case.

The special case then stated that the Defendant had recently felled and cut down the wood growing in part of the waste of the manor called *Crimbourne Wood*, and had reinclosed one part thereof for the growth of timber and underwoods without the consent of the homage, and claimed the right to do so without the consent of the homage under the Act of 29 Geo. 2 and the agreement of 1769.

Five questions were then stated for the opinion of the Court, the main question being whether the agreement of 1769 was binding in perpetuity upon all or any and which of the tenants of the manor and the lord and their heirs and assigns respectively.

Elton and *Raven*, for the Plaintiffs:—

The agreement on which the Defendant's case depends was based upon a mistaken view of the Act 29 Geo. 2, c. 36. That Act applied only to occupiers of tenements to which a right of common of pasture belonged, and had no application whatever to a case like this, of freehold tenants having the actual ownership of the bushes and underwood on the waste. The rights of the Plaintiffs are therefore entirely unaffected by it: *Williams* on Rights of Common (1); *Sir Francis Barrington's Case* (2); *Dibben* v. *Marquis of Anglesea* (3). A right of property of this character differs entirely from a mere right of estovers, or of taking stone. This Act is *in pari materia* with the *Statute of*

(1) Pages 142, 145, 146. (2) 8 Rep. 136 b.
(3) 2 Cr. & M. 722.

Merton, and the other statutes of approvement, upon which it has often been held that they do not affect any rights which are not expressly dealt with by them: *Duberley* v. *Page* (1), *Welcome* v. *Upton* (2), *Dowglass* v. *Kendal* (3), *Arlett* v. *Ellis* (4), *Stanley* v. *White* (5), *Forbes* v. *Ecclesiastical Commissioners* (6), *Fawcett* v. *Strickland* (7), *Shakespear* v. *Peppin* (8), *Potter* v. *North* (9), *Hopkins* v. *Robinson* (10), *Blundell* v. *Catterall* (11), *Grant* v. *Gunner* (12), *Hall* v. *Byron* (13), *Robinson* v. *Duleep Singh* (14), *Earl De la Warr* v. *Miles* (15), and *Williams* on Rights of Common (16). The majority of the tenants of this manor, therefore, had no power to bind their own successors or the minority of the tenants by the agreement of 1769, consequently the Defendant has no right to make the inclosures complained of, and the Plaintiffs are entitled to the relief they claim.

W. Pearson, Q.C., and *Wolstenholme*, for the Defendant:—

Independently of the agreement, the lord of the manor had, and still has, the right to inclose any of the wastes of the manor for the proper growth of timber or underwood without the consent of the homage; and it is manifestly for the benefit of the commoners that he should exercise this right, for otherwise the underwood would cease to exist. There is nothing in the *Statute of Merton* or the other statutes of approvement which take away or derogate from this right. The decisions shew that the soil of the waste lands of a manor being vested in the lord, he may do any act on the common, provided he does not contravene the rights of the commoners. So that if he leaves a sufficiency of common (which is to be measured by the number of cattle levant and couchant on the tenant's land) he may plant trees: *Sadgrove* v. *Kirby* (17); *Cooper* v. *Marshall* (18)—enclose even against turbary or estovers:

(1) 2 T. R. 391.
(2) 6 M. & W. 536.
(3) Brownl. 219; Cro. Jac. 256; 1 Buls. 93.
(4) 7 B. & C. 346.
(5) 14 East, 332.
(6) Law Rep. 15 Eq. 51.
(7) Willes, 57; S. C. Comyn, 577; 6 T. R. 747.
(8) 6 T. R. 741.
(9) 1 Wms. Saund. 347.
(10) 1 Mod. 74.
(11) 5 B. & Ald. 268.
(12) 1 Taunt. 435.
(13) 4 Ch. D. 667.
(14) 11 Ch. D. 798.
(15) 17 Ch. D. 535.
(16) Page 140.
(17) 6 T. R. 483; S. C. 1 B. & P. 13.
(18) 1 Burr. 259; 2 Wils. 51.

V.-C. H. 1882 NICHOLLS v. MITFORD.

Arlett v. *Ellis* (1), and erect buildings for the habitation of woodwards: *Patrick* v. *Stubbs* (2). The rights of the commoners may be subservient to his, so that he may dig clay-pits without leaving sufficient herbage for the commoners if he can prove that he has always exercised such a right: *Bateson* v. *Green* (3). He may, by custom, grant portions of the waste to hold as copyhold with the consent of the homage, and such grants will be binding on the freeholders having rights of common summoned to attend and who might have done so if they pleased: *Lascelles* v. *Lord Onslow* (4). He may also dig, quarry, and mine for his own profit, and the *onus* lies on the commoner to shew that the enjoyment of his right of common has been injured: *Williams* on Rights of Common (5); *Hall* v. *Byron* (6); *Robinson* v. *Duleep Singh* (7). The Act 29 Geo. 2, c. 36, however, under which the agreement in this case was made, expressly empowered the lord with certain assents (which were here duly obtained), to inclose and keep in severalty for the growth and preservation of timber and underwood; and the Act provided the machinery for an appeal, and that in default of appeal the agreement should be for ever binding upon all persons. Here the agreement was duly entered into, registered, and inrolled, and it was never appealed from. It was perfectly valid and effectual, and it has been uniformly acted upon, and moneys have been divided under it for upwards of 100 years. It must be assumed that all the freehold tenants at the date of the agreement were parties to it, and even if they were not, the Plaintiffs, and all other the freehold tenants of the manor are now bound by it in fact and by adoption.

[They also referred to *Peardon* v. *Underhill* (8), *Glover* v. *Lane* (9), and *Williams* on Rights of Common (10).]

Elton, in reply, referred to *Badger* v. *Ford* (11).

Cur. adv. vult.

(1) 7 B. & C. 346.
(2) 9 M. & W. 830.
(3) 5 T. R. 411.
(4) 2 Q. B. D. 433.
(5) Page 151.
(6) 4 Ch. D. 667.
(7) 11 Ch. D. 798.
(8) 16 Q. B. 120.
(9) 3 T. R. 445.
(10) Page 141.
(11) 3 B. & A. 153.

Feb. 6. HALL, V.C.:—

I am of opinion that the statute 29 Geo. 2, c. 36, only applied to cases of an agreement come to between an owner of waste land and owners of common of pasture. There is indeed another case, that of third persons with the assent of both of them, the enactments as to which are not fully set out in the special case, but nothing turns on that. To a case like the present, where there is an interest like that of these persons, *i.e.*, where they are and have been from time immemorial collectively the owners of the underwoods and bushes growing on the wastes of the manor, the Act is inapplicable. Such an interest is beyond the scope of the Act; and it is inapplicable, although the owners of the underwoods and bushes were the freehold tenants of the manor.

Such tenants' rights were proportionate to their holdings, or, as stated in the Court rolls, according to the quantity or the value of their lands, and were not measured by their cattle levant and couchant; and the Act of Parliament did not create a power for the major part in number and value of the commoners to assent to an owner of waste enclosing a waste, unless in a case in which he could, but for the existence of the common rights, have inclosed. The Act would seem to be an extension of the *Statute of Merton*, so as to authorize inclosure with the specified assent, though there would not be sufficient common left for the commoners; but not to subject to inclosure any land of which the lord was not, subject only to the rights of the commoners, the owner. The reasoning in *Sir Francis Barrington's Case* (1), to which I was referred, appears to me to shew that the Act 29 Geo. 2, c. 36, does not deal with a case in which, in addition to the rights of commoners, there are rights of owners of bushes and underwood which the Act does not deal with. The Act falls short of embracing such cases, and it seems to me that any one of the owners of the bushes and underwood could say that the Act was inapplicable to him as such owner, and the whole body of the owners of the bushes and underwoods could not be bound by a majority of them. If this be so, the agreement was inoperative as against such owners.

I may observe that the Act provides for the case of recompense being made, but does not provide for persons other than com-

(1) 8 Rep. 136 b.

V.-C. H. 1882 NICHOLLS v. MITFORD.

moners sharing therein (see sect. 3, not set out in the case). The whole Act, when read and considered, clearly shews, I think, that it in no way deals with or binds the owners of the bushes and underwoods as such owners. It was urged that, there having been an agreement in fact signed, all the co-owners might be taken to be bound by it, there having been an acting under it, and division of moneys under it, and that I should treat all persons interested as bound by it by adoption. I cannot, however, take that view. I think the parties acted probably under a mistaken view of the operation and effect of the Act.

It is, perhaps, not unimportant as to this to take notice, that by the Amending Act, 31 Geo. 2, c. 41, provision was made for the case of persons having only partial interests, whose acts were not to have effect after the determination of their interests (see sect. 3 of the Amending Act). I do not think that, looking at the agreement and the statements in the case, I can assume that all the commoners or freehold tenants at the date of the agreement were owners in fee or were parties to the agreement. The original Act in sect. 4 gives a right of appeal to the Quarter Sessions; but this does not, I think, have the effect of extending the operation of the Act to persons having distinct interests. Having regard to the views I have above expressed, the whole case of the Defendant as asserted in the special case, seems to me to fail; because I consider the agreement was not authorized by the Act, and the Defendant cannot, I think, justify, as acting under the agreement. And it is upon the Act and agreement that the Defendant's case is rested.

Solicitors for Plaintiffs: *Daintrey, Hickson, & Parish.*

Solicitors for Defendant: *Senior, Attree, & Johnson,* agents for *H. G. Brydone, Petworth.*

W. W. K.

In re JOHNSON.
GOLDEN *v.* GILLAM.

[1880 G. 22.]

FRY, J.
1881
Dec. 13, 14, 15.

Fraudulent Deed—Stat. 13 *Eliz. c.* 5 [*Revised Ed. Statutes, vol. i., p.* 627]—*Delaying and defeating Creditors.*

By a deed of gift *J.* granted farming property in trust for her daughters, in consideration of which they covenanted to pay the debts "incurred by *J.* up to the date of the deed in connection with the working arrangement of the farm," and to maintain *J.*

J. had no other property than that comprised in the deed, and the Plaintiff's debt not having been incurred by *J.* in connection with the farm, was defeated by the deed.

The Court found that the deed was an honestly intended family arrangement, and was not executed with the object of defeating creditors:—

Held, that the deed was valid under stat. 13 Eliz. c. 5.

THIS was an action to set aside a deed of gift as fraudulent and void under the statute 13 Eliz. c. 5.

The deed of gift was dated the 12th of June, 1878, and witnessed that in consideration of the natural love and affection of *Judith Johnson*, widow, towards her daughters *Alice* and *Amy*, and of the covenants thereinafter contained, the said *Judith Johnson* granted a farmhouse and premises in *Trunch*, in the county of *Norfolk*, to *Stephen Gillam* and his heirs, as to one moiety to the use of her daughter *Alice*, and as to the other moiety to the use of her daughter *Amy*, and assigned the crops of the farm as to one moiety in trust for *Alice*, and as to the other moiety in trust for *Amy*. And *Alice* and *Amy* covenanted that they, or one of them, would "pay all the just debts incurred by the said *Judith Johnson* up to the date of the said indenture in connection with the working and management of the said farm," and would maintain the said *Judith Johnson* during her life, providing her with a home, food, clothes, and medical or other attendance in such style or manner as she had been theretofore accustomed to.

This deed of gift, which was executed by *Judith Johnson* and *Alice Johnson*, was a conveyance of all the property of *Judith Johnson*.

FRY, J.
1881
In re JOHNSON.
GOLDEN
v.
GILLAM.

The Plaintiff was a creditor of Mrs. *Johnson* at the date of the deed for £120. This debt was not incurred by Mrs. *Johnson*, but by *William Johnson*, her predecessor in the farm, and she had adopted it by giving a promissory note for the amount.

Evidence was offered that there were other creditors of Mrs. *Johnson* besides the Plaintiff, who were not provided for by the deed, but the Court held that none of these debts were proved to have been incurred for purposes unconnected with the farm.

The state of the family of *Judith Johnson* when the deed was executed was as follows: *Judith Johnson* was the widow of *William Johnson*, who had previously been the husband of her sister, and had had by her a family of whom one son, *James*, was living. After his first wife's death *William Johnson* had gone through the ceremony of marriage with *Judith Johnson*, his deceased wife's sister, and had a family by her, of whom *George*, *Arthur*, *Alice*, and *Amy* were living. *William Johnson* had provided for his children, other than *Alice* and *Amy*, out of other property, and shortly before he died he granted the *Trunch* farm—the subject of this litigation—by deed of gift to *Judith Johnson*, in consideration of her covenant "to pay all debts incurred by *William Johnson* in connection with the working and management of the farm, and all liabilities that he might incur for means of living, medical attendance, and expenses of a like nature."

George and *James Johnson* were living away from the farm, *Arthur* lived with his mother, Mrs. *Johnson*, till 1877, when he left, and, Mrs. *Johnson* being then bedridden, the farm was carried on by *Alice*, the elder daughter, and *Amy* (who was an infant at the date of the deed), with the assistance of the Defendant *Gillam*. *Gillam* made them advances of money from time to time for the purchase of cattle and stock, and repaid himself out of the produce. The Plaintiff claimed to set aside the deed to the Defendant as fraudulent against himself and the other creditors of Mrs. *Johnson*.

J. Pearson, Q.C., and *Maidlow*, for the Plaintiff:—

The plain intent of this deed is to provide for one set of creditors only, namely, those whose debts had been incurred by Mrs. *Johnson* in connection with the working and management of the farm.

The debt of the Plaintiff was not incurred by Mrs. *Johnson* in connection with the farm, and if the deed, which conveyed the whole property of *Judith Johnson*, is supported, he will receive nothing.

This deed is fraudulent under the statute of *Elizabeth*: *Cornish* v. *Clark* (1); *Sharland* v. *Mildon* (2); *Thompson* v. *Webster* (3); *Spencer* v. *Slater* (4).

W. W. Karslake, Q.C., and *Hadley*, for the Defendant:—

The question is whether those who took the farm under the deed had any intention to defraud Mrs. *Johnson's* creditors, and there is no evidence of any fraudulent intention on their part. Similar deeds have been upheld: *Holmes* v. *Penney* (5); *Freeman* v. *Pope* (6). This was a proper family arrangement: *Harman* v. *Richards* (7); *Townend* v. *Toker* (8); *Boldero* v. *London and Westminster Loan and Discount Company* (9).

J. Pearson, in reply:—

It is not necessary to shew moral fraud in order to set aside a deed of this description. The Defendant must be taken in law to have intended the result which actually happened from what she did, viz., the defeating of all other than farming creditors: *Spencer* v. *Slater*.

FRY, J., after stating the effect of the deed, said:—

It is clear that the consideration for the deed of the 12th of June, 1878, was in part meritorious and in part valuable. The question before me is whether the deed is void against creditors under the statute of the 13 Eliz. c. 5.

For the purpose of deciding this, it will be convenient and proper to refer to the material words of the statute, and I find these sufficiently stated in a passage of the judgment of Sir *Thomas Plumer*, when Vice-Chancellor, in *Copis* v. *Middleton* (10).

(1) Law Rep. 14 Eq. 184.
(2) 5 Hare, 469.
(3) 4 De G. & J. 600.
(4) 4 Q. B. D. 13.
(5) 3 K. & J. 90.
(6) Law Rep. 5 Ch. 538.
(7) 10 Hare, 81.
(8) Law Rep. 1 Ch. 446.
(9) 5 Ex. D. 47.
(10) 2 Madd. 410.

FRY, J.
1881
In re JOHNSON.
GOLDEN *v.* GILLAM.

He says (1), "The preamble of the Act is, for the avoiding and abolishing of feigned, covinous, and fraudulent feoffments, as well of lands and tenements as of goods and chattels, devised and contrived of malice, fraud, covin, collusion, or guile, to the end, purpose, and intent to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, &c., not only to the let or hindrance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealing . . . between man and man, without which no commonwealth or civil society can be maintained or continued. A conveyance, therefore (the Vice-Chancellor continues), to be affected by this Act, must be shewn to be feigned, covinous, and fraudulent, and made with an intent to delay, hinder, or defraud creditors: But if this case were held to be within the statute, it would be the overthrow of all true and plain dealing and bargaining between man and man; for, as a purchaser cannot know the circumstances of the vendor, it would prevent all dealing and bargaining between man and man, and counteract the object of the statute. The statute, in order to prevent this inconvenience, has by the 6th section provided that the Act shall not extend to any conveyance upon good consideration and *bonâ fide* to any person not having at the time of such conveyance any manner of notice or knowledge of such covin, fraud, or collusion. A conveyance, therefore, cannot be invalidated by this Act if there has been a *bonâ fide* purchaser."

In *Thompson* v. *Webster* (2), Vice-Chancellor *Kindersley* said (3), with regard to the general principle of the Act, "The principle now established is this. The language of the Act being that any conveyance of property is void against creditors if it is made with intent to defeat, hinder, or delay creditors, the Court is to decide in each particular case whether on all the circumstances it can come to the conclusion that the intention of the settlor in making the settlement was to defeat, hinder, or delay his creditors."

It is obvious that the intent of the statute is not to provide equal distribution of the estates of debtors among their creditors—there are other statutes which have that object; nor is it the intent of this statute to prevent any honest dealing between one

(1) 2 Madd. 427.
(2) 4 Drew. 628.
(3) 4 Drew. 632.

man and another, although the result of such dealing may be to delay creditors. And cases have been cited accordingly where deeds of this nature have been held good, though the result of them has been that creditors have been not only delayed but excluded.

The effect on a deed of this sort of its being for good consideration is very great. It does not necessarily shew that the deed may not be void under the statute, because in many cases good consideration has been proved, and yet the object of the deed has been to defeat and delay creditors; such has been, therefore, for an unconscientious purpose, and the fact that there has been good consideration will not uphold the deed. But nevertheless it is a material ingredient in considering the case, and for very obvious reasons: the fact that there is valuable consideration shews at once that there may be purposes in the transaction other than the defeating or delaying of creditors, and renders the case, therefore, of those who contest the deed more difficult. In the case of *Harman* v. *Richards*, the Lord Justice *Turner*, then Vice-Chancellor, makes this observation (1): "It remains to be considered whether the settlement which was thus made for valuable consideration was also made *bonâ fide*, for a deed, though made for valuable consideration, may be affected by *mala fides*. But those who undertake to impeach for *mala fides* a deed which has been executed for valuable consideration, have, I think, a task of great difficulty to discharge."

Lord *Hatherley*, when Vice-Chancellor, adopted the same view in the case of *Holmes* v. *Penney* (2), which has been discussed before me, and the same point was stated with even more force by Lord Justice *Giffard* in *Freeman* v. *Pope* (3). He said in that case (4), "I do not think that the Vice-Chancellor need have felt any difficulty about the case of *Spirett* v. *Willows* (5), but he seems to have considered that in order to defeat a voluntary settlement there must be proof of an actual and express intent to defeat creditors. That, however, is not so. There is one class of cases, no doubt, in which an actual and express intent is neces-

(1) 10 Hare, 89.
(2) 3 K. & J. 90.
(3) Law Rep. 5 Ch. 538.
(4) Ibid. 544.
(5) 3 D. J. & S. 293.

FRY, J.
1881
In re JOHNSON. GOLDEN v. GILLAM.

sary to be proved, that is in such cases as *Holmes* v. *Penney* (1), and *Lloyd* v. *Attwood* (2), where the instruments sought to be set aside were founded on valuable consideration; but where a settlement is voluntary, then the intent may be inferred in a variety of ways." I therefore proceed to inquire, looking to all the circumstances of the case and at the nature of the instrument itself, whether I can or ought to infer an intent to defraud creditors in the parties to the deed. I say in the parties to the deed, because it appears to me to be plain that whatever fraudulent intent there may have been in the mind of *Judith Johnson*, it would not avoid the deed unless it was shewn to have been concurred in by *Alice*, who became the purchaser under the deed. It has not been contended, and it could not be contended, that the mere fraudulent intent of the vendor could avoid the deed, if the purchaser were free from that fraud.

[His Lordship then adverted to the provision which had been made before the date of the deed for the other children of *Judith Johnson*, and continued:—]

Having regard to the condition of the family, the deed was a highly proper one; the sons had left the home, and were provided for by the dispositions which their father had made of the residue of his property; Mrs. *Johnson* was possessed of this farm and of nothing else; the two single daughters living with her must have been objects of her anxiety and care; she was bedridden and not likely to recover; the farm was practically carried on by *Alice*. Thereupon this deed was executed with the obvious intention of making over to the daughters that farm which their mother hoped they would reside on after her decease, to avoid the heavy succession duty which would ensue if she allowed the farm to pass to them under her will, they not being legally her children, but strangers to her. The deed is, I observe, framed on the model of the previous deed, which had been executed by her husband on his death-bed.

Now, it is important to inquire what was the indebtedness of Mrs. *Johnson* when she executed the deed. She appears to have had some current debts, mostly, if not entirely, in respect of the farming business. She owed a Mr. *Simpson*, a witness in the case,

(1) 3 K. & J. 90. (2) 3 De G. & J. 614.

an account for saddlery, the whole of which (with possibly one unimportant exception) was due in respect of the carrying on of the farm. She owed her sister *Sarah Golden* £80, and I cannot infer that that money was borrowed for any other purpose than carrying on the farm, because it is for the Plaintiff to shew that that was so, and he has had *Sarah Golden* in the box and has not asked her anything about it. The sum of £120 was owing from *Judith Johnson* to her brother *William Golden*, the Plaintiff. That sum was borrowed by *William Johnson*, and when she became the owner of the farm she adopted the debt by executing a promissory note, and there was a mortgage debt upon the farm, which had also been a debt of *William Johnson*. It appears by the evidence that Mrs. *Johnson* was a person of good repute among her friends, as a respectable and honest woman, who paid her way, and was in no difficulty. Beyond what I have mentioned she does not appear to have owed anything except ordinary current debts, and was not pressed by a single creditor. That was the state of things when this instrument was executed. One other fact I must mention with regard to the state of the family, which is this, that litigation had been going on which led to some alienation of feeling between Mrs. *Johnson* and other members of the family, and which made it more natural that she should desire the whole of this farm to go for the benefit of her two daughters. Mr. *Gillam* appears to have been the most natural person to select as trustee of the deed, if the purpose of the parties was honest and fair. From what I have seen of him, I do not believe he is a person who would have been a party to a deed which was intended to be kept secret, or to be entered into for the purpose of fraud. I think his selection as trustee is an indication of the good faith with which the transaction was conceived.

With regard to what took place under the deed, it appears to me that there was neither concealment nor publication. Mrs. *Johnson's* name continued to be used as before with regard to the farm. The daughter continued to make the payments, and there was no material change in the way that things were carried on.

The circumstances, looked at independently of the result of the deed, therefore lead me to the conclusion that the intention of the

FRY, J.
1881
In re JOHNSON.
GOLDEN *v.* GILLAM.

parties was to make a perfectly honest family arrangement, under which the daughters were to undertake the burden of paying their mother's debts, and in consideration of that, to take immediately that farm which in all probability they would otherwise have received by will upon their mother's death.

Then it is said, and said truly, that a person must generally be taken to intend the result of his acts. That is often, but by no means always, true, because, although no doubt the immediate and main result of our acts must be the object of our intention, there are many collateral results of acts which are not only not objects of our intention, but against our wish. There are many unintentional results of intentional acts. The operation of the deed, it is said in this case, was to defeat and delay creditors, therefore it is said that that must have been intended. That argument has been presented in two ways. In the first place it has been observed that the deed contained a provision only for the payment of creditors whose debts had been contracted in connection with carrying on the farm: It is said that there must have been debts of other descriptions, and that there was in fact one debt at any rate of another description. But it does not appear to me to be shewn that that debt was present to the mind of the settlor, Mrs. *Johnson*, or to the mind of her daughter; and nothing is more probable, if I were to speculate upon the intention, than that Mrs. *Johnson*, having adopted the debt of *William Johnson*, after a deed conceived in similar terms, would have anticipated that her daughters must in like manner adopt the debt of their uncle under this deed. It appears plain from the case of *Holmes* v. *Penney* (1), that the mere fact of a *bonâ fide* creditor being defeated is not of itself sufficient to set aside a deed founded on valuable consideration. In this case, if I uphold the deed, it seems probable that the Plaintiff will have no remedy in respect of his debt. In that case, by upholding the deed, the plaintiff was excluded from all remedy in respect of his debt, and that debt must have been plainly present to the mind of the settlor, but the Vice-Chancellor thought that the only object of the brother, who was the purchaser of the estate, was to make an honest family arrangement with regard to it. So it appears to me,

(1) 3 K. & J. 90.

in the present case, that the object of the mother and daughters was to make an honest family settlement of the property.

Then again it is said that with respect to many creditors who are included in the covenant, they are defeated and delayed, because before the execution of the deed they had a right against the property, and after the execution of the deed they would only have a right to the enforcement of the covenant. But that is the result of almost any dealing. If I am indebted and sell my estate, my creditors lose their right of proceeding against the estate, and can only proceed against the purchase-money. So in a variety of cases visible chattels or real estate are converted into *choses in action*, and if creditors could complain of that it would, as Sir *Thomas Plumer* pointed out, "restrain honest dealings and transactions between man and man."

There is only one other point on which I wish to observe, although it has not been put to me. It appears plain, that though valuable and good consideration was given by the daughters, that consideration cannot have been the full value of the estate. But it also appears to me to be plain that when a *bonâ fide* and honest instrument is executed for which valuable consideration is given, and the instrument is one between relatives, the Court cannot say that the difference between the real value of the estate and the consideration given is a badge of fraud, and if it is not a badge of fraud, or evidence of an intention to defeat creditors, it has no relation to the case.

I have come, therefore, to the conclusion upon the whole of the case, that the instrument impeached was executed in good faith and for a valuable consideration, that it was an honest family arrangement, and was executed without any intention to defraud or delay creditors. That being so, I dismiss the action with costs.

Solicitor for Plaintiff: *G. Johnson.*
Solicitors for Defendant: *Blake & Hesseltine.*

C. W. C.

FRY, J.
1882
Feb. 28.

CURTIS *v.* SHEFFIELD.

Practice—Revivor—Discretion of Court—Suit abated for more than Twenty Years—Rules of Court, 1875, *Order* L.

It is in the discretion of the Court whether it will allow an action which has become defective by the death of a party or otherwise, to be revived.

An administration suit in which a decree was made by the Court of Chancery in the year 1833, having become defective by the deaths of some parties and the bankruptcy of another, and no step having been taken in it for thirty-nine years, an order of revivor was allowed for the purpose of enabling a party to appeal from an order made in the year 1836 (in case the Court of Appeal should give leave to appeal), the Court being of opinion that no person had altered his position, or incurred any liability, or suffered any loss on the faith of the order from which it was desired to appeal.

THIS was a motion to discharge an order of revivor.

The suit was commenced in the Court of Chancery for the administration of the personal estate of *Joseph Sheffield*, who died on the 4th of July, 1831, and an administration decree was made on the 23rd of November, 1833.

By his will, dated the 22nd of July, 1830, the testator (*inter alia*) bequeathed to his son *Edward Sheffield*, after the decease of his (the testator's) wife *Catherine Sheffield*, the interest on £5000 in the 3 per Cent. Consols, or Reduced, so that he should receive the interest as it became due, and after his death the principal should be equally divided between his surviving children, and no entail was to be cut off in any way. And should he die without issue all his share was to be equally divided among his (the testator's) surviving children. The will contained similar gifts for the benefit of the testator's other children, and their respective issue, with similar gifts over in the event of their respectively dying without issue. The testator left surviving him his widow *Catherine Sheffield* and seven children, viz., *Ann Soutter*, *Catherine Sheffield*, *J. J. Sheffield*, *Charles Sheffield*, *Sarah Curtis*, *Henry Sheffield*, and *Edward Sheffield*. *Catherine Sheffield* afterwards married *John Wenborne*. By an order, dated the 16th of July, 1836, on further directions, it was declared that, on the decease of the testator's widow, *Edward Sheffield* would become entitled to

the income of £5000 3 per Cent. Consols or Reduced Annuities, for his life, and that upon his decease the principal of such stock would be divisible in equal shares amongst his children who should be living at the time of his death, as tenants in common, and that in case he should die without leaving issue, the same stock would be divisible in equal shares amongst the children of the testator, who were living at the time of the testator's decease. Similar declarations were made as to the gifts made to the testator's other children respectively.

The testator's widow died on the 13th of April, 1838. By an order made in the suit, on the 28th of July, 1838, it was ordered that £2500 Consols (part of a larger sum) and £2500 Reduced Annuities (part of a larger sum) should be respectively carried over to an account to be intituled "The account of *Edward Sheffield*, his life interest," and that the dividends thereon respectively should be paid to *Edward Sheffield* during his life, or until further order. These sums were afterwards carried over, and the dividends thereon respectively were paid to *Edward Sheffield* accordingly. By an order made on further directions, dated the 13th of July, 1842, it was ordered that one-sixth part of certain sums therein mentioned, being the residuary estate of the testator, should be carried over to the credit of an account to be intituled "The Defendant *Edward Sheffield* and his children's share of residue," and that the income thereof should be paid to *Edward Sheffield* during his life or until further order, and this was accordingly done. *Edward Sheffield* died on the 23rd of November, 1881, without leaving any issue surviving him. Of the seven children of the testator who were living at the time of his death the only one who survived *Edward Sheffield* was *Henry Sheffield;* all the others (except *Catherine Wenborne*) had left children them surviving.

On the 16th of February, 1882, *Henry Sheffield* obtained an order of course that the decree in the suit, and the accounts and inquiries thereby directed, and the proceedings thereunder, should be carried on and prosecuted against *James Curtis, Edward Curtis, Elizabeth Sheffield,* and *Peter Paget,* in like manner as they might have been against the late Defendants whom those persons represented, if those Defendants had not died. *John Curtis* was the executor of *Charles Sheffield,* who died in February, 1852.

FRY, J.
1882
CURTIS
v.
SHEFFIELD.

Edward Curtis was the personal representative of *Thomas Curtis*, the husband of *Sarah Curtis*, who died in 1869. *Elizabeth Sheffield* was the executrix of *Edward Sheffield*. *Peter Paget* was the official assignee in the bankruptcy of *J. J. Sheffield*, who became bankrupt in 1862, and died in September, 1869, without having obtained his discharge in the bankruptcy. It was not known who were the personal representatives of *Ann Soutter* and *Catherine Wenborne*. *Catherine Wenborne* died soon after the testator, and before any of his other children.

The petition upon which the order of revivor was obtained stated that the Petitioner contended that under the will of his father he was, notwithstanding the declaration contained in the order of the 16th of July, 1836, entitled to the whole of the £5000 stock in which *Edward Sheffield* took a life interest. The object of the order of revivor was to enable *Henry Sheffield* to appeal from the order of the 16th of July, 1836, and he had obtained leave from the Court of Appeal to serve notice of motion for leave to appeal from the order, notwithstanding the expiration of the time limited for so doing.

James Curtis, *Edward Curtis*, *Elizabeth Sheffield*, and *Peter Paget*, gave notice of motion to discharge the order of revivor.

Cozens-Hardy, Q.C., and *Jason Smith*, for the motion:—

The order of revivor was made under rule 4 of Order L., the provisions of which are in substance the same as those of sect. 52 of the *Chancery Amendment Act* of 1852. The authorities before the *Judicature Act* shew that there is no absolute right to revivor; it is in the discretion of the Court, and as a general rule the Court will not allow a suit to be revived when it has been abated more than twenty years: *Bland* v. *Davison* (1); *Hercy* v. *Dinwoody* (2); *Earl of Egremont* v. *Hamilton* (3); *Higgins* v. *Shaw* (4); *Alsop* v. *Bell* (5); *Deeks* v. *Stanhope* (6). In the present case it is nearly fifty years since the administration decree was made, forty-five years since the order on further directions, from which it is desired to appeal, and nearly forty years since the

(1) 21 Beav. 312.
(2) 4 Bro. C. C. 257.
(3) 1 B. & Beat. 516.
(4) 2 D. & War. 356.
(5) 24 Beav. 451.
(6) 1 Jur. (N.S.) 413.

second order on further directions. All this time *Henry Sheffield* has been taking his chance of not being the survivor of the testator's children, in which case he would have benefited by the declaration in the order of 1836. Now that he is the survivor, he wants to get rid of that declaration. The order of 1836 might have been appealed from at the time, for he was then of full age. He has also actually received a share of *Catherine Wenborne's* legacy on the footing of a similar declaration.

J. Pearson Q.C., and *J. Henderson*, for *Henry Sheffield*, were not heard.

FRY, J., after stating the effect of the order of the 16th of July, 1836, continued:—

In pursuance of that order the £5000 was set apart and the income of it has been paid to *Edward Sheffield* during his life. He died a few months ago. The declaration in the order with regard to the interests of the children of the testator in this fund is, it will be observed, both reversionary and contingent. It is not to take effect until the death of *Edward Sheffield*, and it is not to take effect at all if *Edward Sheffield* dies leaving issue, and that event could not be ascertained until his death.

The Defendant *Henry Sheffield* now says that this reversionary and contingent declaration was erroneous, and he has obtained an order of revivor with the intention of applying to the Court of Appeal for leave to appeal against that declaration. I need not say that I have nothing to do with the question whether he ought or ought not to be allowed to appeal; that is a matter within the discretion of the Court of Appeal, with which I have no concern. The question which I have to determine regards the discretion of this Court as to allowing a revivor under these circumstances, because, undoubtedly, the law is this, that, after the long lapse of time which has occurred here, the right to revive is not absolute, but is subject to the discretion of the Court, and in cases of long delay, gross negligence, laches, or change of the situation of the parties in consequence of a decree, the Court has declined to allow a revivor.

I have not, however, to inquire in this case whether any of the

FRY, J.
1882
CURTIS
v.
SHEFFIELD.

first three of these circumstances which operate on the discretion of the Court adversely to the revivor occur, because, as I have already pointed out, the event on which the declaration is to take effect has only just been ascertained, *Edward Sheffield* having died so recently as in November last.

Is there then any reason to suppose that *Henry Sheffield* has allowed any person to alter his position on the faith of the declaration contained in the order of 1836? It is not suggested that any mortgage has been made, that any family settlement has been entered into, that any marriage has taken place on the faith of this declaration. The declaration has remained barren and inoperative from the time it was made down to the present hour.

But it is suggested that *Henry Sheffield* has taken the benefit of other similar declarations made upon the same view of the will with regard to the legacies to his other brothers and sisters. But, when that is looked into, the only case that can be suggested is that of the legacy given to *Catherine Wenborne*, and it turns out that he was entitled *quâcunque viâ*, and therefore he has not in any way obtained the benefit of the corresponding declaration.

All that can be said is, that he has not interfered in the matter, and that he has taken the chance of becoming the survivor of his brothers and sisters, and in that way has taken advantage of this declaration. But when you consider that any other brother or sister who had been the survivor would have been in exactly the same position as *Henry* is now, and that, if he is entitled to revive, the other survivor would have had the same right, it is plain that there is nothing in that argument.

It being, therefore, a matter in my discretion, and there being nothing to shew that any person has altered his situation, or incurred any liability, or suffered any loss on the faith of this declaration, I think there is no ground for refusing leave to revive for the purpose of enabling this declaration, which has only just come into operation, to be discussed in the Court of Appeal. I, therefore, refuse the present application with costs.

Solicitors: *Loxley & Morley; Henderson & Buckle.*

W. L. C.

In re ALBION LIFE ASSURANCE SOCIETY.

SANDERS' CASE.

FRY, J.
1882
Feb. 28

Company — Contributory — Participating Policy — Assignment — Evidence of Transfer—Rectification of Register.

Under the articles of association of an assurance society "members" included "the holders of participating policies duly registered," and payment of premium was to be deemed an agreement to become a member.

The directors of the company had power to require evidence of the assignment of policies before registering the assignees as members.

A participating policy had been assigned, and the assignee had paid a premium on it five months before the winding-up of the company, but no evidence of the assignment had been offered to or required by the directors; and the name of the assignee was not entered upon the register of members:—

Held, that the assignee was not a contributory.

THIS was an application to place Messrs. *Sanders* on the list of contributories in the winding-up of the *Albion Life Assurance Society* as assignees of a participating policy of assurance granted by the company, it having been held that the holder of such a participating policy was liable to contribute in the winding-up: *Winstone's Case* (1).

On the 19th of August, 1872, one *Standfield* assigned a participating policy of assurance on his own life in the *Albion Life Assurance Society* by way of mortgage to Messrs. *Sanders*. Notice of the mortgage was given to the society in November, 1872.

Stanfield's affairs were subsequently liquidated by arrangement, and his trustees sold the equity of redemption of the policy to Messrs. *Sanders*. No notice of the sale was given to the society; but in May, 1877, the annual premium on the policy was paid by Messrs. *Sanders*. The society was wound up on a petition presented in November, 1877.

The following were the material provisions of the articles of association of the society:—

By article 1 assurance members were defined as "holders of participating policies, duly registered," and article 153 provided that "the payment of a premium on such a policy should be deemed to be an agreement to become a member."

(1) 12 Ch. D. 239.

FRY, J.

1882

SANDERS' CASE.

Article 154 was as follows:—

"No person becoming by transfer, assignment, or transmission the holder of a policy which would entitle him if registered to be an assurance member of the company shall be entitled to be registered as a member of the company until he shall have furnished to the directors such evidence as they shall require of the transfer, assignment, or transmission of such policy to him."

Glasse, Q.C., and *Boome*, for the liquidator:—

Messrs. *Sanders* as assignees of the participating policy are contributories: *Winstone's Case* (1).

The register should be rectified by inserting their names on the register of members under the 35th section of the *Companies Act*.

Coolson, Q.C., and *Hornell*, for Messrs. *Sanders*:—

The assignment by way of mortgage did not make Messrs. *Sanders* members, and there was no notice of the subsequent sale to the company.

The right of the directors to have evidence of the transfer was never exercised or waived. Messrs. *Sanders*' names were therefore properly omitted from the register of members, and there is no case to rectify the register: *In re Great Britain Mutual Life Assurance Society* (2).

Glasse, in reply.

FRY, J.:—

The question I have to decide is whether Messrs. *Sanders* are contributories, and as every member of the company is a contributory I have to inquire whether they were members.

Sect. 23 of the *Companies Act*, 1862, defines members as subscribers to the memorandum of association, and every other person who has agreed to become a member and whose name is entered on the register of members.

The inquiry, therefore, in the present case is, first, whether these gentlemen have ever agreed to become members; secondly,

(1) 12 Ch. D. 239. (2) 16 Ch. D. 246.

whether the register of members ought to be amended by placing their names on it.

First, as to whether there was any agreement to become members. [His Lordship considered the facts and held that Messrs. *Sanders* having paid a premium upon the policy had entered into an agreement to become members of the company.]

The next inquiry is whether Messrs. *Sanders* are in such a position that their names ought to be entered on the register under sect. 35 of the *Companies Act*, which provides for making an order for the rectification of the register where any person is without sufficient cause omitted from the register. Therefore the question is whether there was any sufficient cause of omission from the register of the names of these persons.

Now article 154 provides that "no person becoming by transfer, assignment, or transmission the holder of a policy which would entitle him if registered to be an assurance member of the company, shall be entitled to be registered as a member of the company until he shall have furnished to the directors such evidence as they shall require of the transfer, assignment, or transmission of such policy to him."

It does not appear that the directors have ever made such requisition for proof of ownership. It does not appear that they have ever waived their right to require it. It does not appear that any evidence was tendered by Messrs. *Sanders* of their right, and, considering that the only payment of premium was made in May, and a winding-up order was made in the following November, I cannot say that the company have lost their right to evidence of the transfer. It appears to me, therefore, that the omission to register them was not made without sufficient cause, because the condition precedent to registration was not satisfied or waived. Therefore these gentlemen do not come within the definition of members and I must refuse the application with costs.

Solicitors: *Blagden; Philbrick.*

C. W. C.

KAY, J.

1882

Jan. 31;
Feb. 1, 7.

In re HUDSON.
HUDSON *v.* HUDSON.

[1881 H. 500.]

Construction of Will—Cross Executory Limitations—Implication—Original and accruing—Shares.

A will contained a trust of real and personal property during the lives of five children and the survivor to divide the income into five parts, and pay one-fifth to each, if living, or if dead to their respective children or issue, the latter taking equally between themselves in classes the one-fifth share which their parent if living would have taken. And if any one of the five children died without leaving children or issue, or if such issue failed during the period, the share of such children or issue, to belong to the others of the testator's children and their issue in the same way as original shares. This clause to apply to accruing as well as original shares, and upon the death of the last surviving child the capital to testator's grandchildren in classes, *per stirpes*.

One child died leaving children. One of the grandchildren died, leaving one child, *Lucia*, who died unmarried before the period had expired:—

Held, upon a special case to determine what became of *Lucia's* share of income—that she took only a life interest, and that on her death her share went equally among her uncles and aunts and their issue *per stirpes*, cross limitations being implied to effect this.

Rules deducible from the authorities:—

1. Cross executory limitations in the case of personal estate, like cross-remainders of real estate, are only implied to fill up a hiatus in the limitations which seems from the context to have been unintentional.

2. They cannot be implied—as cross-remainders could not—to divest an interest given by the will.

3. The existence of other cross-limitations between different persons does not prevent the implication.

4. But where such express cross-limitations are in favour of the persons to whom the implied cross-remainders would convey the property, that circumstance is of weight in determining the intention.

Special Case.

Edward Hudson by his will, dated in 1845, gave all his real and personal estate to trustees upon certain trusts therein mentioned for the benefit of his wife, and then "upon trust during the lives of my five children and the lives and life of the survivors and survivor of them to divide the income of my trust property or the proceeds thereof, after deducting all costs, charges, and expenses

of the said trusts and management, as also the income of the sum set apart for my said wife after her decease or second marriage, into five equal parts, and to pay one-fifth equal part of such residuary income unto each of my children if living, or if dead unto their respective children or issue, the latter taking equally between themselves in classes the fifth share which their parent if living would have taken, and if under age the same to be applied for their benefit as my trustees think fit, and the shares of females, both as regards my daughter and granddaughters or other female issue, to be for their sole and separate use. And I further declare that the shares of my said children, grandchildren, and issue in the said income shall during the period aforesaid be inalienable. And if any of my said children, grandchildren, or issue, shall attempt to sell, alienate, mortgage, charge, or incumber their shares in the said income before the same shall become due, or shall become bankrupt, or insolvent, or a writ of execution shall be issued out against them, the trust hereinbefore contained for his, her, or their benefit shall wholly cease, and his, her, or their share in the said income shall belong to and become the property of my said trustees or the survivors or survivor of them, and be applied or withheld for their own benefit, or for the benefit of my said children or grandchildren, or any of them, as they my said trustees shall think proper. And if any of my children shall die without leaving children or issue, or such issue shall fail during the period aforesaid, then the share of such children or issue shall belong to the others of my said children and their issue in the same way and upon the same terms as their original shares, and this clause is to apply to accruing as well as original shares. And upon the decease of my last surviving child, then upon trust to divide the whole of my property, subject to my wife's interest in the sum set apart for her, and upon her death or second marriage, then that sum also unto and amongst all my grandchildren (if more than one), and if but one to such one equally share and share alike, and to pay, assign, convey, or transfer the same accordingly, and if under age, the income of their shares to be applied for their benefit as my said trustees shall think proper, and the shares of females to be for their separate use, and in case any one or more of my said

KAY, J.
1882
In re HUDSON.
HUDSON *v.* HUDSON.

grandchildren shall be then dead leaving lawful issue such issue to take and receive the share of the deceased parent, and all such interest as he, she, or they would have been entitled to if living, and in case all my said children shall depart this life without leaving any children or issue living at the death of my last surviving child, then in trust for my right heirs and next of kin according to the said trust property and premises."

By a codicil to his will the testator, after reciting the trusts for the division of his property amongst his grandchildren after the death of his last surviving child, continued :—

"Now it is my will and desire to alter the said trust and direction, and instead of dividing the whole of my property upon the death of my last surviving child in the manner hereinbefore recited, to divide the same in the manner hereinafter mentioned, and I do accordingly will and desire, empower, and direct the trustees and trustee for the time being of my will upon the decease of my last surviving child to divide the whole of my property (subject to my wife's interest in the sum set apart for her, and upon her death or second marriage then that sum also) between and amongst my grandchildren in classes so and in such manner that the child or children of each of my five children who shall leave a child, children, or issue living at the death of my last surviving child shall form one class, and be entitled to and have one full equal part of the whole of my property between them if more than one share and share alike, and if but one so as such one shall take the whole of such equal part. And I direct my property to be paid, assigned, conveyed, or transferred accordingly, and if any of such grandchildren shall be under age the income of their shares to be applied for their benefit, as my trustees or trustee shall think proper, and the shares of females to be for their separate use, and in case any one or more of my grandchildren shall be then dead leaving lawful issue such issue to take and receive the share of the deceased parent and all such interest as he, she, or they would have been entitled to if living."

The testator died in September, 1862, and his widow died in 1871. There were five children living at the testator's death. One of these children, *Robert*, died in 1863, leaving seven children,

one of whom, *Edward Hurst Hudson*, died in 1871, leaving one child only, namely, *Lucia Alice Hudson*, who attained twenty-one in August, 1878, and died intestate and unmarried in July, 1879. During her minority a part of the income of the trust funds after the death of her father had been applied for her maintenance, and the remainder had been accumulated for her benefit, but before she attained her age of twenty-one she became lunatic, having been found so by inquisition in December, 1878.

The question therefore arose who was entitled to the accumulations and to the income accruing and to accrue from her death in July, 1879, until the death of the last surviving child of the testator.

Edward Hurst Hudson, the father of *Lucia Alice Hudson*, made a will by which he gave all his real and personal estate to his brother *Robert John Hudson*, who became bankrupt in 1879, and the trustees under his bankruptcy were made Defendants. Under these circumstances the accumulations and accruing income of the share of *Lucia Hudson* were claimed, first, by the legal personal representative of *Lucia Hudson;* secondly, by the trustees of *Robert John Hudson*, on the ground that *Edward Hurst Hudson* took an absolute vested interest in the income of his share upon the death of his father, *Robert Hudson*, which was never divested, and passed by his will to *Robert John Hudson;* and, thirdly, the said accumulations were claimed by the children and grandchildren of *Robert Hudson*, on the ground that according to the true construction of the will of the testator *Edward Hudson* they were entitled to the said income from the death of *Lucia Hudson*, divisible among them *per stirpes*.

The questions for the opinion of the Court were :—

1. Whether the legal personal representative of *Lucia Alice Hudson* was entitled to such of the accumulations of her said share of income as arose during her minority, or if not, who was entitled.

2. Whether such legal personal representative was entitled to such of the accumulations as arose between the dates of *Lucia Alice Hudson's* majority and death, or if not, who was entitled.

3. Whether such legal personal representative was entitled to the income of the said share, or any and what part thereof, which

KAY, J.
1882
In re HUDSON.
HUDSON v. HUDSON.

had accrued since the death of *Lucia Alice Hudson*, or might thereafter accrue until the death of the testator's last surviving child, or if not, who was entitled.

W. Barber, Q.C., for the personal representative of *Lucia Hudson*.

Whitehorne, Q.C., and *Williamson*, for the children of *Robert Hudson*, uncles and aunts of *Lucia Hudson*, contended that they were entitled to the share taken by *Lucia Hudson*.

[They cited *Woodgate* v. *Unwin* (1); *Macgregor* v. *Macgregor* (2); *Malcolm* v. *Martin* (3); *Pearce* v. *Edmeades* (4); *In re Ridge's Trusts* (5); *Armstrong* v. *Eldridge* (6); *Draycott* v. *Wood* (7); *Baldwin* v. *Rogers* (8).]

Macnaghten, Q.C., and *B. Rogers*, for two of the Defendants, contended that the gift to the children of *Robert Hudson* was original, not substitutional, and that *Lucia Hudson*, the daughter of one of those children, upon her parent's death took a vested interest in the share: *Martin* v. *Holgate* (9); *Strother* v. *Dutton* (10).

Romer, Q.C., and *Ingle Joyce*, for two Defendants, trustees in bankruptcy of *Robert John Hudson*, the legatee under the will of *Edward Hurst Hudson*, contended that after the death of any child of the testator the share of that child went to his children according to the number of such children. Here there were seven children living at their father's death, and each child took a vested interest which he could dispose of by will.

KAY, J.:—

The will in this case contains a trust of property during the lives of five children and the survivor to divide the income into five parts and pay one-fifth to each if living, or, if dead, to their respective children or issue, the latter taking equally between

(1) 4 Sim. 129.
(2) 1 D. F. & J. 63.
(3) 3 Bro. C. C. 50.
(4) 3 Y. & C. Ex. 246.
(5) Law Rep. 7 Ch. 665.
(6) 3 Bro. C. C. 215.
(7) 8 L. T. (N.S.) 304.
(8) 3 D. M. & G. 649.
(9) Law Rep. 1 H. L. 175.
(10) 1 De G. & J. 675.

themselves in classes the one-fifth share which their parent if living would have taken; the shares of daughters, granddaughters, or other female issue for their separate use, and the shares of children, grandchildren, and issue to be inalienable with a gift over on attempt to alien them. And if any of the five children should die without leaving children or issue, or such issue should fail during the period, the share of such children or issue to belong to the others of the testator's children and their issue in the same way as original shares; this clause to apply to accruing as well as original shares, and upon the death of the last surviving child the capital to the testator's grandchildren *per capita*, altered by the second codicil to grandchildren in classes *per stirpes*.

One child died leaving many children. One of these grandchildren died leaving one child *Lucia*. This great grandchild *Lucia* died unmarried before the period had expired.

The question is, what becomes of the share of income which she enjoyed.

It is claimed:

1. By her uncles and aunts, brothers and sisters of her father.
2. By the legal personal representatives of her father.
3. By her own legal personal representatives.

It might be possible according to a well-known series of cases of which *Bridge* v. *Yates* (1), *Amies* v. *Skillern* (2), and *Macgregor* v. *Macgregor* (3), are examples, to read the gift as creating a tenancy in common between the different classes but a joint tenancy between the members of each class. Thus *Lucia's* father may have been joint tenant with his brothers and sisters, but upon his death, leaving issue—a daughter, *Lucia*—who took his share, that joint tenancy, if it existed, would be severed as to the share taken by *Lucia*, so that she was tenant in common with her uncles and aunts, as was held in *Heasman* v. *Pearse* (4).

But then it is argued that the Court must imply a cross-limitation of her share on her death without issue for the benefit of her uncles and aunts and the other members of that *stirps*, of which her father was one.

The principle on which cross-limitations are implied is stated

(1) 12 Sim. 645.
(2) 14 Sim. 428.
(3) 1 D. F. & J. 63.
(4) Law Rep. 7 Ch. 275.

KAY, J.
1882
In re HUDSON.
HUDSON v. HUDSON.

by Sir *J. Wigram* in *Vanderplank* v. *King* (1) in terms to this effect:—

1. Where it is plain that the testator intended that one of the devisees should take the whole estate if no other were born to share it with him, it is implied that he must have intended that if others were born and died immediately, such a circumstance should not deprive the survivor of the share of the deceased children.

2. A gift over, on failure of issue of all the devisees, supposes an estate in the whole property to exist in all those devisees.

3. Any Court would now hold that an express gift of cross-remainders in one event did not preclude the Court from giving cross-remainders in another.

This last *dictum* is said to conflict with the decision in *Clache's Case* (2) where there was a devise of a messuage to the testator's daughter *A.* and her heirs, and another messuage to another daughter *T.* and her heirs, and if *T.* died under sixteen, *A.* then living, to *A.* and her heirs, and if *A.* should die leaving no issue, *T.* living, *A.'s* share to *T.* and her heirs, and if both his daughters should die without issue, over. Provided that if *A.* should marry *J. H.* all her part should go to *T.* and her heirs. Provided also, that if *T.* die leaving no children, all the premises should go over to the two daughters of *C.* *A.* did not marry *J. H.*, so that this gift did not take effect. *T.* attained sixteen, and died without issue. If she took a fee simple no cross-remainder was possible, but it was held that she took an estate tail, and because that estate would have been divested in favour of *A.* if she had died under sixteen, a cross-remainder on her dying subsequently without issue could not be implied in *A.'s* favour, and therefore it went to the testator's heirs.

The decision in *Vanderplank* v. *King* was that an express cross-limitation between the individuals of one stock did not prevent the implication of cross-remainders between the several stocks, which does not conflict with *Clache's Case.*

The point arose again in *Rabbeth* v. *Squire* (3), which, in its

(1) 3 Hare, 1, 18. (2) Dyer, 330 b.
(3) 19 Beav. 77.

circumstances, much resembled this case, though, as will be seen, there was an important distinction. The will there contained a gift of realty and personalty to trustees upon trust as to one-fifth of the income for each of the testator's five children for life, and after his or her death for his or her children whom he should leave, share and share alike, if he should leave none for the other children of the testator for life, and the issue of those then dead in the same manner, equally to be divided between them, and after the death of all the children the *corpus* for all grandchildren *per capita*. *Sarah*, a daughter of the testator, died after him, leaving one child, who died without issue before the death of the last surviving child of the testator, so that there was a complete failure of that *stirps*. It was held by Lord *Romilly* that *Sarah's* child took only a life estate, and that *Sarah's* share during the rest of the period was undisposed of on the ground that, there being an express limitation over in the event of a child of the testator dying without leaving children to the other children of the testator, no other cross-limitation could be implied to those same children, relying on *Clache's Case* (1), and this decision was affirmed by Lord *Chelmsford* (2) on the same ground.

In *Atkinson* v. *Barton* (3) Lord Justice *Turner* stated the principle on which cross-remainders are implied, thus: "The Court, upon examining the will, finds that there has been some omission, and it therefore introduces, by implication, such estates as are necessary to supply the omission, having regard in so doing to the manifest intention of the testator appearing by his will," and after considering *Clache's Case* and *Rabbeth* v. *Squire* (4), which he does not think "can be considered as establishing any general rule applicable to all cases;" he continues, "Cross-remainders are to be implied or not to be implied according to the intention. The circumstance of such remainders having been created between the same parties in particular events is a circumstance to be weighed in determining the intention, but is not decisive upon it."

The decision in this case was varied in the House of Lords: *Atkinson* v. *Holtby* (5), but the statement of the principle was

(1) Dyer, 330 b.
(2) 4 De G. & J. 406.
(3) 3 D. F. & J. 339, 346.
(4) 19 Beav. 77.
(5) 10 H. L. C. 313.

KAY, J.
1882
In re HUDSON.
HUDSON v. HUDSON.

not affected by such variation, as was observed by Lord *Hatherley* in *Re Clark* (1), in a judgment in which he adopts the statement of the law by Sir *J. Wigram* and Lord Justice *Turner* in the two cases I have referred to, and Lord *Hatherley* recognises in that case the rule which was established by the decision in *Skey* v. *Barnes* (2) that cross-limitations will not be implied to divest interests which have vested under the same will.

In the case of *In re Ridge's Trusts* (3), where the direction was to pay the income of the property equally among the daughters of the testator during their respective lives, and if all or any should die leaving issue, corresponding shares or a share of the principal to such issue in equal shares, and if only one daughter should leave, issue, all to such issue, but if all should die without leaving issue, over, then followed a general residuary bequest; one daughter died leaving issue, another died leaving no issue, and the third was still living.

Lord Justice *James* said that in a devise of real estate to three and the heirs of their bodies as tenants in common, and a gift over in the event of all dying without issue, cross-remainders would be implied.

This case his Lordship said fell within the same principle. "It is a case in which we are authorized and bound to fill in the will, and to supply the gaps by judicial implication of the testator's meaning," and cross-limitations between the daughters and their families were implied. The learned Judge pointing out that this did not contradict anything in the will. The result was that the share left vacant went one half to the children of the deceased daughter, the other half to the surviving daughter for life.

This case is not irreconcilable with the decision in *Rabbeth* v. *Squire* (4), because there was no express cross-limitation among the daughters. But the authority of *Rabbeth* v. *Squire* is shaken by the judgment of Lord Justice *Turner* in *Atkinson* v. *Barton* (5), which was approved by Lord *Hatherley* in *Re Clark* and in *Coates* v. *Hart* (6), where the bequest was for *A.*, *B.*, and *C.* for their lives, and if any die under twenty-one and without leaving issue, to the survivors for their lives, if any left issue his share to such issue, if

(1) 11 W. R. 871.
(2) 3 Mer. 335.
(3) Law Rep. 7 Ch. 665, 668.
(4) 19 Beav. 77.
(5) 3 D. F. & J. 339.
(6) 3 D. J. & S. 504.

all died without issue, over, and one attained twenty-one and died without issue, it was held that a cross-limitation of the income to the survivors must be implied notwithstanding the express cross-limitation to them in another event.

In this state of the authorities I may venture to express my own opinion. It seems to me that it would be inexpedient to lay down an absolute rule that cross-limitations in one event to particular persons should preclude the implication of cross-limitations to them in any other event, but the better rule is that where there is a gap plainly left it is competent for the Court to imply cross-limitations to fill up that gap, notwithstanding that there may be cross-limitations expressed in some other event to the same persons, that being, as Lord Justice *Turner* said, a circumstance to be weighed in considering whether it is consistent with the intention to imply cross-limitations.

I deduce from these authorities the following rules:—

1. Cross executory limitations in the case of personal estate like cross remainders of real estate, are only implied to fill up a hiatus in the limitations, which seems from the context to have been unintentional.

2. They cannot be implied—as of course cross remainders could not—to divest an interest given by the will.

3. The existence of other cross-limitations between different persons does not prevent the implication.

4. But where such express cross-limitations are in favour of the very persons to whom the implied cross-limitations would convey the property, that circumstance is of weight in determining the intention.

Instances in which such a gap occurs are:

(*a*) Where there is a gift to several named persons for their respective lives as tenants in common, and a gift over after the death of the survivor: *Draycott* v. *Wood* (1).

(*b*) Where in a similar gift there are limitations over of the shares of the tenant for life to their respective children or issue for limited interests, as for life or in tail, and then a gift over on failure of issue of them all.

(*c*) And generally where, there being such a gift over, the preceding limitations do not provide for every event except that

(1) 8 L. T. (N.S.) 304.

KAY, J.
1882
In re HUDSON.
HUDSON *v.* HUDSON.

contemplated by the gift over, but leave some gap which would occasion an intestacy as to part of the estate.

In this case there is a cross-limitation upon failure of any *stirps* to the other *stirpes*, but there is no cross-limitation between the individuals of the same *stirps*, where the Court is asked to imply one. Therefore the difficulty which arose in *Clache's Case* (1) and *Rabbeth* v. *Squire* (2) does not exist here.

The most important question accordingly is, what is the nature of the interest which the issue of a child takes in the income during the period which is measured by the life of the surviving child. The gift to the children may be read during their respective lives, or it may be read one-fifth to each during the whole period, to be divested in a particular event. The income is to be divided into five parts, but then the testator provides for a substitution if any child die leaving children or issue, and also if any die without leaving children or issue or such issue should fail, that in effect gives the children only life interests. But as between the grandchildren or remoter issue there is no such provision expressed. It has been assumed that the children of a child who dies leaving children takes his share among them, and that the issue of a grandchild in like manner take the grandchild's share, and I think this is the effect of the gift. The question is, do they take for life or do they take interests during the whole period, subject to be divested on death leaving children. If for life only, cross-limitations may be implied between the individuals of a *stirps* during the period, if not, there can be be no such implication.

Where there is an ambiguity it is proper to look at the consequences of either construction.

It is hardly possible to believe that it was intended that any part of the income should go to the legal personal representatives of deceased grandchildren or remoter issue. It is said that this is reasonable as to the grandchildren, because such grandchildren would take vested interests in the principal of the fund. But the grandchildren were to take the principal *per capita*, and therefore their shares of income and principal would be different, so that no inference can be derived from the ultimate gift of capital. But the strongest objection to this construction is, that the trust of the

(1) Dyer, 330 b. (2) 19 Beav. 77.

income is in the nature of a provision to maintain living persons until the death of the last surviving child, and this intention would be defeated if each taker had more than a life interest in such income.

There is nothing expressed which determines without ambiguity whether the grandchildren or remoter issue take respectively for life or for any larger interest.

Lord *Cranworth*, in *Abbott* v. *Middleton* (1), says: "Where by acting on one interpretation of the words used we are driven to the conclusion that the person using them is acting capriciously without any intelligible motive, contrary to the ordinary mode in which men in general act in similar cases, there, if the language admits of two constructions, we may reasonably and properly adopt that which avoids these anomalies, even though the construction adopted is not the most obvious or the most grammatically accurate. But if the words used are unambiguous they cannot be departed from merely because they lead to consequences which we consider capricious or even harsh and unreasonable." In *Gordon* v. *Gordon* (2) Lord *Cairns* quotes this passage, and says that it expresses the law on this subject with much accuracy and felicity, adding that no Judge more consistently adhered to sound and strict principles of construction in the interpretation of wills than Lord *Cranworth*, to whose language he was referring.

In a case of so much ambiguity the Court ought to adopt the construction which best carries out that which it conceives to be the general intention. I therefore hold, as was held in *Rabbeth* v. *Squire* (3), that *Lucia* took only a life interest, and that the intention was—in the event which has happened of her death leaving no issue—that her share should go equally among her uncles and aunts, and the issue of deceased uncles or aunts *per stirpes*, and I imply the necessary cross-limitations to effect this.

Solicitors: *T. W. Nelson; Wilkinson & Son; Williamson, Hill, & Co.*

(1) 7 H. L. C. 68, 89. (2) Law Rep. 5 H. L. 254, 284.
(3) 19 Beav. 77.

T. W. G.

MANISTY, J.

1882

Jan. 11, 12, 13, 23.

HOBBS *v.* MIDLAND RAILWAY COMPANY.

[1880 H. 0323.]

Railway Company — Landowner — Superfluous Lands — Conveyance — Ultrà Vires — Lands Clauses Consolidation Act (8 *Vict. c.* 18), 1845, *s.* 128 [*Revised Ed. Statutes, vol. ix., p.* 661].

The mere fact of a railway company purporting to convey away lands acquired by them for the purposes of their undertaking is not conclusive to shew that the lands so conveyed are superfluous lands within the meaning of sect. 128 of the *Lands Clauses Consolidation Act*, 1845.

The *M. Railway Company* having, under their special Act passed in 1872, acquired for the purposes of their undertaking certain lands forming part of a farm belonging to *H.*, purported, acting in excess of their parliamentary powers, to sell and convey the lands to the *S. Railway Company* under a *bonâ fide* arrangement by which they were to be held and used for the purposes of the undertakings of both companies.

Upon an action brought by *H.* against both companies to establish his right of pre-emption under sect. 128 of the *Lands Clauses Consolidation Act*, 1845, in the lands conveyed, the ten years from the time fixed by the *M. Company's* Act for the completion of their works not having yet expired:—

Held, that the mere fact of the conveyance was not sufficient to shew that the lands were superfluous within the meaning of that section; and that, inasmuch as it appeared from the evidence that, had the lands remained in the hands of the *M. Company*, they would not have been superfluous for the purposes of that company within that section, the Plaintiff's right of pre-emption had not yet arisen; but that the conveyance from the *M. Company* to the *S. Company* must be set aside as *ultrà vires*.

THIS was an action by *John George Hobbs*, a landowner, against the *Midland Railway Company* and the *Severn Bridge Railway Company*, seeking to establish his right of pre-emption in certain land sold by him to the former company and resold by them to the latter company: the ground of the action being that the land was "superfluous land" within the meaning of the 128th section of the *Lands Clauses Consolidation Act*, 1845.

By the *Severn Bridge Railway Act*, 1872, which incorporated the *Lands Clauses Consolidation Acts*, 1845, 1860, and 1869, and other general Acts, the *Severn Bridge Railway Company* were authorized to make and maintain certain railways and works, and to take and use certain lands for that purpose: and the same

company and the *Midland Railway Company* were authorized from time to time to enter into and carry into effect agreements with respect to the maintenance, management, use and working of the said railways, or any of them, or any part thereof respectively, and the conveyance of traffic thereon, and any incidental matters: and the *Midland Company* were required from time to time to forward, transmit, collect and deliver traffic passing from or destined for the said railways, or any of them, to, from, at and over the railways and railway stations belonging to the *Midland Company* without any undue interruption or delay. The time limited for the completion of the undertaking was five years from the passing of the Act.

By the *Midland Railway (Additional Powers) Act*, 1872, which received the royal assent seven days after the *Severn Bridge Railway Act*, and incorporated the above general Acts, the *Midland Company* were authorized to make and maintain certain lines of railway and works, and to enter upon, take and use such of the lands described in the deposited plans and books of reference as might be required for that purpose; the time limited for the completion of the undertaking being five years from the passing of the Act. This Act contained no special reference to the undertaking of the *Severn Bridge Company*.

At the time the above special Acts were passed the Plaintiff was the owner in fee simple of a farm at *Sharpness* in *Gloucestershire*, called the *Oldminster Farm*, including a messuage, used partly as the farmhouse and partly as an inn under the name of the *Oldminster Arms*.

In the month of March, 1873, the *Midland Company*, under the powers of their special Act, agreed with the Plaintiff for the purchase of certain lands forming part of the *Oldminster Farm* and coloured red on the plan annexed to the statement of claim, and shortly afterwards these lands were duly conveyed by the Plaintiff to the *Midland Company*.

In the month of February, 1875, the *Midland Company*, in further pursuance of the powers of their Act, served the Plaintiff with a notice to treat in respect of the *Oldminster Arms*, and certain lands adjoining also forming part of the *Oldminster Farm*. The lands comprised in this notice were coloured yellow and green

MANISTY, J. 1882 HOBBS v. MIDLAND RAILWAY CO.

on the said plan, the *Oldminster Arms* standing on part of the land coloured green.

An agreement for sale was then entered into, and ultimately, by an indenture dated the 16th of December, 1875, the Plaintiff conveyed the lands coloured yellow and green to the *Midland Company* for the purposes of their Act, and the company thereupon entered and took possession of the same. The whole of the lands coloured yellow and green formed one strip, bounded on the west by the lands coloured red previously conveyed to the *Midland Company*, and on the east by a piece of land which had been allotted and set out as a private road under an award made by the Commissioners appointed by a local Inclosure Act passed in 1839, and which road divided the lands coloured yellow and green from other parts of the *Oldminster Farm* belonging to the Plaintiff.

By an agreement dated the 28th of April, 1876, and made between the *Midland Company* of the one part and the *Severn Bridge Company* of the other part, it was agreed that a joint passenger station should be constructed for the purposes of the undertakings of the two companies at the point of junction of the railways authorized by their Acts and near the said lands coloured red, yellow, and green. And by the same agreement the *Midland Company* agreed to sell to the *Severn Bridge Company* the said lands coloured red, yellow, and green at cost price, with interest at 4 per cent. per annum, and the *Severn Bridge Company* agreed to sell to the *Midland Company* other lands at a like rate; and various stipulations were entered into with respect to the use of such lands respectively for stations, sidings, and works.

In 1877 the *Severn Bridge Company* obtained an Act extending the time for the completion of their undertaking to three years.

By an indenture dated the 17th of March, 1879, the *Midland Company*, in part pursuance of the agreement of the 28th of April, 1876, sold and conveyed the *Oldminster Arms* and the lands coloured yellow and green to the *Severn Bridge Company*.

By an Act called the *Severn and Wye and Severn Bridge Railway Companies Act*, 1879, the *Severn Bridge Company* and a company called the *Severn and Wye Railway Company* were amalgamated under the name of the *Severn and Wye and Severn Bridge Railway Company*, and it was enacted that the "under-

takings" of the amalgamated companies, including their railways and "all lands, stations, approaches, sidings, warehouses, works, and conveniences connected or held therewith" should be vested in the *Severn and Wye and Severn Bridge Railway Company* (hereinafter referred to as the "*Severn Bridge Company*"), and that such company should have all the powers and be subject to all the obligations of the amalgamated companies.

MANISTY, J. 1882 HOBBS v. MIDLAND RAILWAY CO.

At the time of the passing of the last-mentioned Act there were, upon the land coloured yellow, various sidings and other works which had been constructed by the original *Severn Bridge Company* for the purpose of effecting communications with the railways of the *Midland Company;* but no works had yet been constructed upon the land coloured green.

The Plaintiff alleged in his statement of claim that the *Midland Company* had completed the railway and works authorized by their special Act without making use of the messuage and land coloured green; that such messuage and land became and were superfluous lands, and that the *Midland Company*, having no occasion for them, sold and conveyed them by the said indenture of the 17th of March, 1879, to the *Severn Bridge Company* as superfluous lands.

The said indenture did not, however, in terms describe or refer to the property conveyed as being in fact superfluous lands, the deed being a simple conveyance to the *Severn Bridge Company* in the ordinary form for valuable consideration.

The Plaintiff further alleged that he was at the time of such sale and was now the person entitled to the lands from which the said superfluous messuage and land were originally severed, and that he was desirous of purchasing the same according to the provisions of the *Lands Clauses Consolidation Act*, 1845; that the said messuage and land were not "lands situate within a town, or lands built upon or used for building purposes" within the meaning of such Act, and that the *Midland Company* ought therefore, before disposing of the same to the *Severn Bridge Company*, to have first offered to sell the same to him, which they had neglected to do; and that the *Severn Bridge Company* had no power to purchase or hold the said messuage and land for the purpose of their undertaking.

MANISTY, J. 1882 HOBBS v. MIDLAND RAILWAY CO.

By his original statement of claim the Plaintiff's claim extended to the land coloured yellow, as well as to the green, but in his amended statement he confined his claim to the green, though he declined to admit that the *Severn Bridge Company* had parliamentary power to purchase the yellow compulsorily.

The Plaintiff accordingly claimed that it might be declared that the messuage and land coloured green ought to have been first offered to him before they were sold and disposed of to the *Severn Bridge Company*, and that the Defendants respectively might be ordered to convey the same to him, or as he should direct, upon payment by him of a price to be settled by agreement, or by arbitration under the *Lands Clauses Consolidation Act*, 1845.

The *Midland Company* in their statement of defence alleged that they required the whole of the lands coloured yellow and green for the purpose of their railway and works, including sidings and works for the interchange of traffic between themselves and the *Severn Bridge Company*, and that no part of such lands ever became superfluous lands not required for the purposes of the undertaking of them the *Midland Company;* and that they could not and did not complete their railway and works, or part with any of the said lands, without arranging for the whole thereof to be used for or to be available for railway works and sidings in connection with their undertaking; also that the agreement of the 28th of April, 1876, was a mutual arrangement entered into for the purposes of the undertakings of the two companies, and that the arrangement made for the acquisition by the *Severn Bridge Company* of the lands coloured yellow and green, and the construction thereon of railways and works, was an arrangement made for the benefit of both companies and to enable the *Midland Company* to carry on their undertaking according to the true intent and meaning of the said special Acts; that at the time of making the agreement they, the *Midland Company*, believed that the *Severn Bridge Company* were authorized to acquire and hold the lands coloured yellow and green and to construct thereon such sidings and works as aforesaid, and that, but for such belief, they would not have parted with such lands, but would have retained the same for the purposes of the sidings and works

necessary for carrying on their undertaking in connection with the traffic over the *Severn Bridge Company's* railways; that it was contemplated that the whole of such lands would be eventually required for siding and other accommodation as traffic increased; and that there never was any intention on the part of them, the *Midland Company*, to dispose of any part of such lands as superfluous lands, or to dispose of any part thereof in any manner otherwise than for the purpose of the traffic aforesaid. The *Midland Company* also denied the Plaintiff's allegation that the messuage and land coloured green were not lands built upon or lands used for building purposes within the meaning of the *Lands Clauses Consolidation Act;* and they disputed the Plaintiff's title to the lands from which the lands sold to them were originally severed.

The statement of defence of the *Severn Bridge Company* was to the same effect, with the addition that they insisted they had power under their special Act to purchase the lands coloured yellow and green for the purposes of their undertaking.

Both companies submitted that if the Court should be of opinion that the *Severn Bridge Company* had no power to hold the messuage and land coloured green, then they were entitled to have the agreement of the 28th of April, 1876, set aside as having been entered into under a mistake, and that the *Midland Company* were entitled to resume possession of the premises on repaying the purchase-money to the *Severn Bridge Company*.

Issue having been joined, the action now came on for trial.

Witnesses were called on behalf of the defendant companies, and their evidence clearly shewed that if the land coloured green had remained in the hands of the *Midland Company* it would not have been superfluous land within the meaning of the *Lands Clauses Consolidation Act*, and that it would eventually be required for the purposes of that company.

Higgins, Q.C., and *Speed*, for the Plaintiff:—

The *Midland Company* having acquired the land coloured green under the powers of their special Act could only use it for the purposes of their undertaking. The *Severn Bridge Company* had no compulsory power to take the land, and the *Midland Company*

MANISTY, J. 1882 HOBBS v. MIDLAND RAILWAY CO.

had no power to sell, except subject to our right of pre-emption under sect. 128 of the *Lands Clauses Consolidation Act*, 1845. The land has never been used for the purposes of either of these undertakings.

The mere fact that the land was sold by the *Midland Company* to the *Severn Bridge Company* shews that it was superfluous for the purposes of the former company; the sale being in itself conclusive evidence: *Lord Carington* v. *Wycombe Railway Company* (1); *London and South Western Railway Company* v. *Blackmore* (2); *Lord Beauchamp* v. *Great Western Railway Company* (3).

The fact that the land in question is separated from the other lands of the Plaintiff by a private road, does not prevent the latter lands from being "immediately adjoining lands" within the meaning of the 128th section, and so take away his right of pre-emption: *Coventry* v. *London, Brighton, and South Coast Railway Company* (4). Moreover, the land in question is obviously not "land in a town"; neither is it "land built upon or used for building purposes" within the meaning of that section: *Lord Carington* v. *Wycombe Railway Company*; *London and South Western Railway Company* v. *Blackmore*.

The right of pre-emption in the Plaintiff arose the moment the *Midland Company* sold the land to the *Severn Bridge Company*, and the *Midland Company* cannot now be remitted to their original position, and be at liberty to treat the land as not superfluous: *London and South Western Railway Company* v. *Blackmore*.

[They also referred to *Great Western Railway Company* v. *May* (5).]

Rigby, Q.C., and *Phipson Beale*, for the *Midland Railway Company*:—

This land is not superfluous land within the meaning of the *Lands Clauses Consolidation Act*. Where land may be required at some future time for the purposes of the undertaking, although at

(1) Law Rep. 2 Eq. 825; Ibid. 3 Ch. 377.
(2) Law Rep. 4 H. L. 610.
(3) Law Rep. 3 Ch. 745.
(4) Ibid. 5 Eq. 104.
(5) Ibid. 7 H. L. 283.

the moment it may happen not to be wanted by the company, then it is not superfluous land: *Hooper* v. *Bourne* (1); and our evidence conclusively shews that this land will be required.

This land is, moreover, "land built upon or used for building purposes," and therefore the right of pre-emption under the Act does not arise.

Again, the Plaintiff is not an "adjoining owner," for the land in question is severed from his other lands by a private road, the soil of which is in the lord of the manor: *Hooper* v. *Bourne* (2).

We submit that the sale to the *Severn Bridge Company* is not conclusive evidence that the land was superfluous: it is no doubt a piece of evidence which may be used against us, but it is not conclusive. If the conveyance had actually stated that the land was superfluous, then we might have been bound; but the conveyance contained no such statement.

In re Metropolitan District Railway Company and Cosh (3), and *Mulliner* v. *Midland Railway Company* (4), were also referred to.

W. D. Rawlins, for the *Severn Bridge Railway Company*:—

It does not follow that because land taken by a company cannot immediately be made available for the purposes of the undertaking, it must therefore be deemed superfluous land: if it is retained by the company with a reasonable expectation of using it for the purposes of their Act, it is not superfluous: *Betts* v. *Great Eastern Railway Company* (5).

Higgins, in reply:—

The fact that the land in question is severed from the Plaintiff's other lands by the private road, is immaterial; the Act does not require that, in order to give a man a claim as "adjoining owner," the land taken from him by the company and that remaining in his possession should be physically contiguous: *Holt* v. *Gas Light and Coke Company* (6). The *Midland Company* are not at liberty to plead mistake or surprise, for they were bound to know and

(1) 3 Q. B. D. 258; 5 App. Cas. 1.
(2) 3 Q. B. D. 258.
(3) 13 Ch. D. 607.
(4) 11 Ch. D. 611.
(5) 3 Ex. D. 182.
(6) Law Rep. 7 Q. B. 728.

MANISTY, J. 1882 HOBBS v. MIDLAND RAILWAY CO.

carry out the provisions of the Legislature as to superfluous lands: *May* v. *Great Western Railway Company* (1). The 128th section does not mean that a piece of land situate, as this is, in the open country is "land built upon," merely because it has a single house upon it: *Lord Carington* v. *Wycombe Railway Company* (2).

Jan. 23, 1882. MANISTY, J.:—

This case is one of some importance, and in one respect, so far as I know, raises a question upon which there is no direct authority, and which I shall therefore have to deal with by the light of other cases which have a bearing upon it.

The case on the part of the Plaintiff may be very briefly stated. The Plaintiff was the owner of certain lands forming a farm, called the *Oldminster Farm*, with a messuage upon it used partly as a farmhouse and partly as an inn, and called the *Oldminster Arms*.

In the year 1875, the *Midland Railway Company*, under their Act of 1872, took for the purposes of their undertaking the *Oldminster Arms* and part of the adjoining land, the property so taken being coloured yellow and green on the plan which has been referred to, and forming one continuous piece of land abutting on the one side on a road set out under an Inclosure Act, and on the other side on other lands purchased by the *Midland Company* from the Plaintiff, but as to which no question arises.

In 1876 the *Severn Bridge Railway Company* entered into an agreement with the *Midland Railway Company* for the purchase of the whole of the land coloured yellow and green, and in 1879 the *Midland Company* conveyed the land to the *Severn Bridge Company*.

Now what the Plaintiff says is this: "You, the *Midland Company*, acquired the yellow and the green for the purposes of your undertaking; you entered into the agreement of 1876, and ultimately did, in 1879, convey to the *Severn Bridge Company* the whole of that land; and I claim the green upon the ground that it is superfluous land." He claims to have the green conveyed to him, because, as he alleges, the *Midland Company* have sold it as superfluous land, the *Severn Bridge Company* being now the

(1) Law Rep. 7 Q. B. 364. (2) Law Rep. 3 Ch. 377.

owners of it; and he says, "You, the *Midland Company*, have not complied with your Act of Parliament which embodies the *Lands Clauses Consolidation Act*, and have not offered the land in the first instance to me, and therefore I claim to have the land under the 128th section of the *Lands Clauses Consolidation Act*."

The Plaintiff originally set up a claim to the yellow as well as to the green, but for some reason or other he now makes no claim in respect of anything but the green. Probably that is because upon the yellow the *Severn Bridge Company* have laid down a considerable extent of sidings and rail forming a communication of a very important character between their railway and that of the *Midland Company*. However, he now limits his claim to the green, which consists of a piece of land upon part of which the *Oldminster Arms* now stands.

Now there is no doubt that if a company does acquire land pursuant to their Act of Parliament for the purpose of their undertaking, and if they do, within the time prescribed by their Act during which they may retain the land, sell the land as superfluous land, then the person from whom the land was originally taken, may, under the 128th section of the *Lands Clauses Consolidation Act*, take proceedings to have it conveyed to him, notwithstanding that the ten years from the time limited by the special Act for the completion of their works have not expired. That point is well settled, and I need not dwell upon it. Consequently, if the Plaintiff can satisfy the Court that the land in question was superfluous land, and that the *Midland Company* have parted with it as such to the *Severn Bridge Company*, then no doubt he is entitled to have the land re-conveyed to him.

Therefore the first question in this case is, Was this superfluous land? And that of course lies at the root of the whole case.

Now what constitutes superfluous land? That also is well settled, because it is defined by what may be called the "preamble" to the 127th and 128th sections of the *Lands Clauses Consolidation Act*. It is defined in this way, "With respect to lands acquired by the promoters of the undertaking under the provisions of this or the special Act, or any Act incorporated therewith, but which shall not be required for the purposes thereof"—that is, for the purposes of the undertaking—"be it enacted as follows." I pass

MANISTY, J. 1882 HOBBS v. MIDLAND RAILWAY CO.

over the 127th section, because that is not the section under which the Plaintiff is claiming; he claims under the 128th section, which enacts that "before the promoters of the undertaking dispose of any such superfluous lands, they shall, unless such lands be situate within a town, or be lands built upon or used for building purposes, first offer to sell the same to the person then entitled to the lands (if any) from which the same were originally severed." A question is raised upon that to which I shall have to refer.

Now, who is the person designated in the Act as the person to whom the offer is to be made? He must be "the person then entitled to the lands from which the same (the superfluous lands) were originally severed." I think myself that there is a very plain and obvious distinction between the person who is mentioned in the 127th section as the person who is entitled at the expiration of the prescribed period and the person mentioned in the 128th section. The reason for making that distinction of course I know not and perhaps it is unnecessary to consider on the present occasion. It seems from the language used, and it is plain enough, that by the 128th section the land in question must be offered to that person who is the owner of the land from which the particular land was originally severed. Now upon that it is unnecessary for me to dwell, having regard to the conclusion at which I have arrived upon what is the main question in the case, namely, whether these lands at the time when they were parted with were *de facto* superfluous lands. But inasmuch as perhaps this case will be taken to a higher Court, I will dispose of this point very briefly.

Is the Plaintiff the person entitled to be offered the land in question, as being the owner of the land from which it was severed? It is said that he is not, by reason of the road which intervenes between the land in question and the land on the other side which is also part of the same farm from which this land is taken. I will just advert very briefly to the authorities upon that point. The case of *Coventry* v. *London, Brighton, and South Coast Railway Company* (1) relates to the owners of "land immediately adjoining" the superfluous land who are entitled under the second

(1) Law Rep. 5 Eq. 104.

part of the 128th section, and therefore, in my view, it does not apply to the present case, which depends upon the first part of the section.

Then there are two cases which have dealt with this question. One is *London and South Western Railway Company* v. *Blackmore* (1). That was a case depending on the construction of the 128th section, and the question was whether or not Mr. *Blackmore* was the person entitled under the 128th section to claim as adjoining owner the right of pre-emption of certain lands which the company was about to sell. The head-note says: "Where, by agreement, a wall has been built on land dividing the property of an individual from that of the company, and the individual and the company are, by the same agreement, the joint owners of the land on which the wall is built, that circumstance does not affect the individual, so as to prevent him from being considered an 'adjoining owner.'" This question is dealt with in the judgment of the Lord Chancellor *Hatherley*. He says (2), "That being so, there then arose the other question upon which we have heard the respondents, namely, what was to be done with reference to the present position of things. This gentleman, the present plaintiff, is not the owner of land from which the property was severed that is now in question, namely, Lots 9 and 10; he has subsequently become the owner of property which adjoins it, and he finds himself in that position at the time of the sale. But his rights are very different in respect to that property from what they would be with respect to land which had been actually taken from him. With regard to land actually taken from an owner, the Legislature appears to have been desirous that no person should be called upon to sell more than was really wanted for the purposes of the railway; and, therefore, it has been provided that as soon as it should be ascertained that the lands are not wanted for the purposes for which the Legislature intended that they should be taken from the landowner, and that they are superfluous, he should have the opportunity of re-acquiring the land of which he had been so deprived by the operation of the Act. Therefore the case of such a landowner is, no doubt, a much stronger case than that of persons who happen to be owners at the time when the

(1) Law Rep. 4 H. L. 610. (2) Law Rep. 4 H. L. 619.

MANISTY, J. intended sale takes place, but who have no such right as I have described."

1882

HOBBS v. MIDLAND RAILWAY CO.

Therefore, in Lord *Hatherley's* opinion, the adjoining owner under the 127th section stands in a different position to that of the landowner from whom the land in question has been taken, and who is still the owner of the property from which it was taken.

I think that *Holt* v. *Gas Light and Coke Company* (1) also shews that the two classes of owners stand in different positions, and that the meaning of the 128th section is to the effect I have stated; because, in that case, Mr. Justice *Blackburn* (now Lord *Blackburn*), says (2): "Now, as I understand, Mr. *Philbrick's* contention was that no lands can be held along with, so as to be held therewith or severed from the others in any sense, unless physically contiguous." So in this case it is said that the land remaining in the Plaintiff's possession and that which he claims are not physically contiguous. Upon that Lord *Blackburn* goes on to say: "I do not see anything in the wording of the Act to apply to that; nor do I see anything in the nature of the thing to require it. In the present case, the land leased of *Raphael*, though not actually contiguous, is held for the very same purpose. The lease was expressly obtained, because the other land in front of the butts could not be used for a rifle range without it; and it was for that reason required for the very purpose of enabling the other land to be used as a rifle range; and *Raphael's* land was occupied not by the same title, but occupied by the same occupier, or the same parties, for the same common object. I think, therefore, in every sense of the word, it was held 'therewith.' I do not inquire precisely whether the word 'severed' distinctly applies—whether this would or would not be properly and strictly called 'severance,' because I am of opinion that the words 'severed or injuriously affected,' quite apply to such a case as this." That is to say, the land taken was a part of land which was used for one and the same purpose; and the intention of the Act seems to be that if part of such land—no matter whether there is a road intervening or not—is taken from the owner, and part of that so taken turns out to be superfluous, the owner of the remaining land must

(1) Law Rep. 7 Q. B. 728. (2) Law Rep. 7 Q. B. 737.

have the right of pre-emption under the 128th section. I say no more upon this question, because my judgment does not depend upon it. I only wish to call attention to the authorities, so that, if the case goes further hereafter, they may appear on the face of the judgment.

Hooper v. *Bourne* (1) was not the case of a former owner, but the case of an adjoining owner claiming under the 127th section. Therefore I do not think that case applies to the present.

I will dispose very shortly of another point, as to whether or not the road between the land taken by the company and the Plaintiff's remaining land was vested in the lord of the manor, or whether it was vested in the "adjoining owner." If it were necessary to decide the question, my present impression is that the soil and freehold of the road itself were vested in the lord of the manor. I do not occupy time by going into all the reasons by which I have come to that conclusion, since I do not think that it affects the present case; because my present impression is that as the Plaintiff is the owner of the farm, and as the green forms part of the farm, he ought to have the right of pre-emption.

There is only one other point that I should notice before I come to that which is the main question in the case. Was the land coloured green built upon so as to come within the exception in the 128th section? I do not propose to express any opinion upon that, as it seems an open question which, if necessary, will have to be decided hereafter in this or some other case; but I think there is a good deal to be said on both sides as to that question.

The great and fundamental question in the case is whether or not this piece of green was, before and at the time when it was conveyed to the *Severn Bridge Company*, superfluous land within the meaning of the definition of "superfluous land" in the *Lands Clauses Consolidation Act.*

I think the cases of *Great Western Railway Company* v. *May* (2), *Hooper* v. *Bourne*, and *Betts* v. *Great Eastern Railway Company* (3), have now settled beyond all controversy what the meaning of "superfluous land" is, and what land ought, under ordinary circumstances, to be considered superfluous land.

(1) 3 Q. B. D. 258; 5 App. Cas 1. (2) Law Rep. 7 H. L. 283.
(3) 3 Ex. D. 182.

MANISTY, J. 1882 HOBBS v. MIDLAND RAILWAY CO.

The test is whether or not there is *bonâ fide* reason to believe that within no very distant time, or within a reasonable time, having regard to the nature of the undertaking, the land acquired by the company will be required for the purposes of the undertaking; because, if so, then so long as that prospect continues, and there is *bonâ fide* reason to believe that the land will come into use, the Legislature has not done anything so absurd or so unjust as to hold that that land which will in all probability be required for the purposes of the undertaking should be sold to the then adjoining owner, there being every probability that it will have to be repurchased by the railway company for the purposes of their undertaking. It would be strange indeed if the evidence in any particular case led to the conclusion that the land would in all probability be required for the purposes of the undertaking, and yet, because the ten years prescribed had run out, it must be sold, and sold to the then adjoining owner, with almost the certainty that it will have to be repurchased from him. I think the cases I have referred to have established this, that it is a matter of evidence whether the land is superfluous land within the meaning of the Act, according to the definition to which I have referred.

As I have already said, I think the main question in this case is whether at the time when the land was conveyed to the *Severn Bridge Company* it was superfluous land; because, if it was not so at that time, it seems to me that the time has not yet arrived when the question can be gone into at all.

Was, then, the land superfluous land at the time when the *Midland Company de facto* sold and conveyed it to the *Severn Bridge Company?* Now I do not propose to go at length into the evidence on that point, but it is to my mind all one way. There is no evidence on the part of the Plaintiff: he depends upon the fact of the sale and the conveyance. The Defendants say that is not conclusive. I am of opinion that it is not conclusive, and if it is not conclusive, then we must look into the evidence which has been adduced on the part of the Defendants; and it seems to me that that evidence is overwhelming to shew that if the land had remained in the hands of the *Midland Company* it would not have been superfluous land within the meaning of the Act. If the

land was not superfluous within the meaning of the Act before the sale and conveyance to the *Severn Bridge Company*, did the sale and conveyance make it so? Is that conclusive evidence that it was superfluous land? I think not, for several reasons. One reason perhaps is enough. If the *Midland Company* had no right or power to part with that land, then the remedy of the Plaintiff, as the owner of the land from which it was severed, is to have the conveyance set aside; that is his first step towards getting a title to the land as superfluous. He has the right to have that deed set aside so that his other rights in the land may hereafter be open to him.

Now if I set this deed aside, as I purpose to do, what is the consequence?

Apart from the mere fact of the deed having been executed, the parties will stand in their original position—they will be remitted to their original rights. I think it is perfectly clear that if the deed be set aside, then, unless the mere fact of the execution of that invalid deed made the land superfluous, the land will remain just as it was, and the *Midland Company* will have a right to say against any one, "This land is now ours, and it is not superfluous land; it will be required for the purposes of our undertaking." Then, if that be so, what right has the Plaintiff to have that land conveyed to him? When I have restored the parties to their original position, the land will be the land of the *Midland Company*—land in their hands which in all probability will soon be required for the purposes of their undertaking. Then does the deed make any difference? No doubt, if a railway company parts with land within a prescribed period to another railway company, or to an individual, *primâ facie* it is superfluous land, because otherwise they have no right to part with it; but it seems to me that that is not conclusive.

No doubt the authorities go to this, that if the land is superfluous land, and is sold as superfluous land, and is conveyed by the company because they consider it superfluous, then, it being within their rights that they should part with it, the only question remaining is as to the right of pre-emption. But if the land be *de facto* not superfluous land, surely the effect of a sale cannot be to make it superfluous. It seems to me that what makes this

MANISTY, J. 1882 HOBBS v. MIDLAND RAILWAY CO.

case differ from all others is this, that the object of the two companies was really and truly *bonâ fide*, though they acted under a mistake of law.

This brings me to allude—which I will do very shortly—to the Acts of Parliament under which the companies were acting.

By the *Severn Bridge Railway Act*, 1872, the *Midland Company* and the *Severn Bridge Company* were authorized to enter into working agreements, the *Midland Company* being required to give traffic facilities to the *Severn Bridge Company*. Then by the *Midland Railway Act* of the same year, but which received the royal assent a few days later than the other Act, the *Midland Company* were authorized to take land for the purposes of their undertaking. I do not think that that Act contains any special powers; probably it was thought that those which were in the *Severn Act* would be sufficient.

That was the state of things in 1872. Then in 1876 the *Midland Company* and the *Severn Bridge Company* entered into an agreement for the construction of a joint passenger station. And the agreement went on to provide that the *Midland Company* should sell to the *Severn Bridge Company* the land coloured green and yellow, and to make various stipulations as to the use of such lands for sidings and other works. So that erroneously, but, no doubt, *bonâ fide*, supposing they could enter into such arrangements, these two companies made arrangements by which there would be one joint station and a vast addition of sidings so as to complete a system of railways which would give effect, as they thought, to those Acts of Parliament and enable them to give mutual facilities to the public and themselves.

These are the only Acts I need refer to, with the exception of the *Amalgamation Act* of 1879, which, it is said, ratified and confirmed that agreement and the conveyance under it. I do not think it did. I do not think it ever was the intention of the Legislature to ratify agreements or conveyances which the companies had no power to make, and to render those acts valid which were invalid as being contrary to law. But the point upon which I mainly rely is this, that this case differs from all the cases I know of, cases where the companies have sold land within the prescribed time, where they have sold it out and out, selling

it as superfluous land, and stating it to be such in point of fact; the mere question being whether the person entitled to pre-emption could claim it though the prescribed period had not elapsed.

Such being the purpose for which the *Midland Company* parted with this land, and it not being competent to them to enter into an arrangement of this kind, and they having sold the land with a view to preserving a joint interest in it, so as to carry out the purposes of their undertaking in the way they thought most conducive to the public and their own good, how can I say that by selling it for that purpose they have made it superfluous land? They made a conveyance and contract which they had no right to make in point of law, and therefore that transaction must be set aside, and they must be remitted to their original rights. The two companies may have to settle their differences between themselves. It may be that Parliament may think it right to sanction some arrangement in order that the object which the two companies have in view shall be carried out. With that, however, I have nothing to do. The only point I have to deal with is whether at the time of that transaction these were superfluous lands; and whether, if I set that transaction aside, as I mean to do, they become superfluous lands and the Plaintiff is entitled to them, simply because of the arrangement which cannot be carried into effect.

I will not occupy time by going in detail into the authorities upon that point, because they are quite distinct from the present case.

There is the case of *Lord Carington* v. *Wycombe Railway Company* (1). In that case the land was taken originally for a purpose which was not a purpose of the undertaking, but in order to resell it to a Mr. *Terry*. It was a fraud upon the Legislature to get an Act authorizing land to be taken apparently for the purposes of the company, but really with a view of selling it to Mr. *Terry*. Of course, as might be expected, the deed was set aside. The question also was dealt with whether the land built upon had passed or not. The Vice-Chancellor said it was originally bought in order to make a profit upon the transaction; it

(1) Law Rep. 2 Eq. 825; 3 Ch. 377.

MANISTY, J. 1882 HOBBS v. MIDLAND RAILWAY CO.

was a fraud upon the Act of Parliament by which the powers were conferred. The land never was intended for the purpose of the undertaking; and the declaration was that the Plaintiffs were entitled to pre-emption and that the conveyance to *Terry* must be set aside. I see the Plaintiff in the present case does not specifically claim to have the conveyance set aside, but that there may be a conveyance to him. The circumstances of that case shew that it is no authority for holding in the present case that the lands are superfluous.

In the case of *London and South Western Railway Company* v. *Blackmore* (1) the question was whether the lands were sold as superfluous. They were sold expressly as superfluous lands, being described in the particulars of sale as "surplus land at *Teddington*." The Court held that under these circumstances it did not lie in the mouth of the company to say the land was not superfluous.

But then how does that apply to a case in which the company did not sell the land as superfluous land, but sold it with a view of using it for the purpose of their own undertaking as well as for the purposes of another company. The Vice-Chancellor said in the case to which I have just referred that not only was the land actually superfluous land, but that the company had put it up for sale and had sold it as such; and accordingly that the Plaintiff, though the time had not elapsed, was entitled to come in and obtain the pre-emption. There is a good deal in the case bearing upon the question of who is the person entitled under the 128th section, but I will not take up time in considering that.

Then there was another case of *Lord Beauchamp* v. *Great Western Railway Company* (2). That was a case of setting apart lands to make a road. That cannot apply here, because in the result the Court arrived at the conclusion that that was one of the purposes of the undertaking, and therefore it was impossible to hold it was superfluous land; in other words, the Court held that the land was not superfluous.

These are the only authorities bearing on the matter, but, as I have already said, I do not find any authority for the proposition that if land is sold by a company without stating that it is

(1) Law Rep. 4 H. L. 610. (2) Law Rep. 3 Ch. 745.

superfluous, and if the land is really and *de facto* held *bonâ fide* for the purpose of the undertaking, or for joint purposes, both purposes of the undertaking, the land can be held to be superfluous land. I think that in this case the mere fact of selling the land was not conclusive; that the evidence is overwhelming that it is not superfluous land; and that what took place did not make it superfluous land. The result is that the sale of the green—for that is the only part in question—must be set aside, and the consequence is that the Plaintiff is right so far. He had a right to come here because he has an interest in the land to this extent, that when the prescribed time runs out it may turn out to be superfluous land. He has therefore a perfect right to say, "The time may come when I shall have the right to have that land, and therefore I ask that the agreement may be set aside." So far he is in the right. He is in the wrong in asking to have the land conveyed to him, and the Defendants are in the wrong in having insisted that their arrangement is binding, and that there was a right on the part of the *Midland Company* to sell the land to the *Severn Bridge Company*.

I therefore order the conveyance by the *Midland Company* to the *Severn Bridge Company* to be set aside, but I do not order the land to be conveyed to the Plaintiff; and since he has to a certain extent succeeded in his action, I order the Defendants to pay the Plaintiff one half of his costs of the action.

Solicitors: *C. Sawbridge*, agent for *F. J. Blake, Wotton-under-Edge; Beale, Marigold, & Co.; Twisden & Parker*, agents for *Wiltons & Riddiford, Gloucester*.

G. I. F. C.

C. J. B.
1882
April 3.

Ex parte WHITNALL. *In re* WHITNALL.

Composition—Registration of Resolutions—Vacating Registration—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 82, 127.

A debtor will not be allowed, by delaying registration of the resolutions, to postpone payment of a composition which has been accepted by his creditors.

Accordingly a delay of more than three weeks, owing to non-payment by inadvertence of the fees for stamps, in obtaining the registration of resolutions for a composition, is ground for vacating, on the application of a creditor, the registration.

APPEAL from an order of the *Essex* County Court vacating the registration of resolutions for a composition.

On the 11th of January, 1882, *Whitnall*, the debtor, filed a petition for liquidation, and a receiver was at once appointed and an order made restraining creditors, who were suing the debtor, from further proceeding with their actions until after the first meeting.

At the first meeting of the creditors, held on the 30th of January, a resolution was passed by the creditors, and at a second meeting on the 13th of February confirmed, for accepting 3*s.* in the pound in satisfaction of their debts, the proxy for *Banks*, a creditor who had commenced an action for £51 5*s.* 2*d.*, alone dissenting. It was subsequently arranged that an objection which had been made to *Banks'* proof should be withdrawn, and the resolution signed by his proxy, and that Mr. *Lewis*, the debtor's solicitor, should guarantee the payment of the composition.

The resolutions, from the necessary fees for stamps not having, from inadvertence, been transmitted to the Registrar of the County Court (at *Chelmsford*) until the 8th of March, were not registered until the 9th of March.

On the 27th of February a clerk from *Peace & Waller*, who were *Banks'* solicitors, called at the office of Messrs. *Lewis* for a cheque for the amount of the composition. *Lewis* being then engaged, told the clerk that if he would wait a few minutes he would give him a cheque. The clerk said he could not wait, and requested that a cheque might be forwarded. *Lewis* promised to

do so, and on the 4th of March sent to *Peace & Waller* a cheque for the composition. This cheque was returned on the 6th of March in a letter which first called the attention of *Lewis* to the omission to send the registration fees. On the 9th of March notice, in lieu of statement of claim, was delivered in the action commenced by *Banks* against the debtor; and *Banks* subsequently applied to the County Court that the registration of resolutions for the composition of 3*s.* in the pound might be discharged, on the ground that the provisions of the *Bankruptcy Act*, 1869, and the rules in that behalf, as to the filing of the resolutions within the prescribed time, were not complied with, and that before presentation of such resolutions to the Registrar the prescribed stamps were not affixed thereto.

An order vacating the registration having been made by the County Court Judge on the 14th of March, the debtor now appealed.

J. Lawson Walton, in support of the appeal:—

A merely formal defect or irregularity by non-compliance with certain directory rules not essential to the validity of the transaction, is no sufficient ground for vacating the registration: *Bankruptcy Act*, 1869, s. 82; and in the absence of fraud the registration of the resolutions is conclusive evidence that all the requisitions of the Act in respect of such resolutions have been complied with: *Bankruptcy Act*, 1869, s. 127; *Heather* v. *Webb* (1); *Elmslie* v. *Corrie* (2). It was the duty of the Registrar, under sect. 126, upon being satisfied that the resolutions were passed in manner directed by that section, to register them. Even assuming that there was an irregularity of which the creditor could take advantage, he is estopped by his own delay. Between the 4th of March, when he knew that the resolutions had not been filed, and the 9th of March he might have given notice of objection and appeared before the Registrar, in manner pointed out by rule 295, but having waited until the registration was completed, he cannot be allowed to take advantage of a mere technical irregularity in order to set aside the registration, and thus work great injustice to the debtor and the other creditors.

(1) 2 C. P. D. 1. (2) 4 Q. B. D. 295.

C. J. B.
1882
Ex parte WHITNALL. *In re* WHITNALL.

E. Cooper Willis, Q.C., for the Respondent:—

Until the necessary stamps were affixed the resolutions could not be filed: rule 206; and the Registrar could not take any steps at all upon them: *Ex parte Davis* (1). It is no mere technical irregularity of which the creditor complains. The time for payment of the composition expired on the 2nd of March, and the stamps were not affixed until the 9th of March. With notice of these facts the Registrar ought not to have registered the resolutions, as a debtor cannot be allowed, by delay in paying the fees, to postpone registration until a subsequent period, and thus obtain additional time for payment of the composition to the prejudice of the creditors.

Walton, in reply.

BACON, C.J., said that this appeal could not be allowed, especially in the face of the case (*Ex parte Davis*) which had been cited on behalf of the Respondent. The law was established for the protection of creditors, and it was plain by the rules that every resolution must, within three days, be filed, with a statement of the debtor's affairs, and that the stamp must be affixed before the resolution is presented to the Registrar for registration. In this case the resolution to accept a composition payable within fourteen days was confirmed on the 13th of February, 1882. On the fourteenth day no payment whatever had been made, and it was not until the 9th of March that there was any resolution on the file. By this non-registration the creditors lost their right and lost their remedy of enforcing payment of their composition. No reason was suggested, except that there had been some negligence or inadvertence on the part of the person whose duty it was to forward the fees for stamps. Why was the creditor to be deprived of the bargain which he had made? Sect. 127 of the *Bankruptcy Act*, 1869, which provided that in the absence of fraud the registration of the resolutions was to be conclusive evidence that such resolutions were duly passed, and that all the requisitions of the Act had been complied with, had no application to that case. It was not the registration which was challenged, but the

(1) Law Rep. 7 Ch. 526.

non-registration. With respect to sect. 82, which provided that formal defects or irregularities should not invalidate proceedings in bankruptcy unless the Court was of opinion that substantial injustice had been caused by such defect or irregularity, the injustice in this case was to the creditor, who would be deprived of the bargain he had made, if the debtor were to be allowed to enlarge the time for payment of the composition. The County Court Judge was quite right in the view he took of the case, that there had been no registration such as the law required, and no such payment as the parties contemplated, and the appeal must be dismissed with costs.

Solicitors: *Peace & Waller; E. J. Lewis.*

F. G. A. W.

C. A.
1882
V.-C. B.
Jan. 20.
C. A.
Jan. 25.

In re VRON COLLIERY COMPANY.

Company — Winding-up — Execution — Companies Act, 1862 (25 & 26 *Vict.* c. 89), *ss.* 85, 163 [*Revised Ed. Statutes, vol. xiv. pp.* 222, 238]—*Forbearance by Creditor.*

A creditor of a mining company made repeated applications for payment through the year 1881, and on the 21st of December obtained a payment on account, and being unable to obtain more, he, on the 28th of December, issued a writ. On the 4th of January, 1882, a paid-up shareholder in the company, who was under considerable liability as a surety for the company, presented a petition to wind it up, setting out a balance sheet which shewed that the assets greatly exceeded the liabilities, but not alleging as a fact that they did so, stating that the company was unable to pay its debts, and that it was just and equitable that it should be wound up. On the 6th of January the creditor recovered final judgment without notice of the winding-up petition, and on the following day issued execution. On the 14th of January the petition came on to be heard and was supported by creditors, and a winding-up order was made. The creditor then applied for leave to go on with the execution:—

Held, by *Bacon*, V.C., that leave ought to be granted:

Held, by the Court of Appeal, that the petition could not be treated as a petition collusively presented on behalf of a solvent company for the purpose of defeating the execution, for that the balance sheet could not be treated as proving the company to be solvent, and the Petitioner, though not legally a creditor, was virtually such, and by amending the petition by joining one of the supporting creditors it might have been made a creditor's petition; and consequently that leave to proceed with the execution ought not to be given:

Held, also, that leave ought not to be given on the ground that the creditor had given indulgence to the company, as he had never given time to the company in the sense of binding himself not to sue, but had merely abstained from suing:

Whether the having given indulgence to a company is a sufficient reason for allowing a creditor to continue his proceedings notwithstanding a winding-up, *quære*.

Ex parte Railway Steel and Plant Company, In re Taylor (1) and *In re Richards & Co.* (2) doubted.

THE *Vron Colliery Company* was formed in 1872. In 1881 it was indebted to *Forrest* for goods supplied, and throughout that year he made frequent ineffectual applications for payment. On the 21st of December, 1881, he attended a meeting of the board

(1) 8 Ch. D. 183. (2) 11 Ch. D. 676.

and obtained a payment on account. Being unable to obtain more, he, on the 28th of December, issued a writ, and on the 6th of January, 1882, final judgment was signed for £99 debt and costs. On the same day a writ of *fi. fa.* was issued, and the sheriff, on the 7th, seized various chattels of the company. On the 7th of January *Forrest* received notice that a winding-up petition had been presented on the 4th, and he thereupon instructed the sheriff's officer not to sell till leave could be obtained from the Court.

This petition was presented by the chairman of the company, who was a holder of 3100 fully paid-up shares. It stated a balance sheet, dated the 28th of November, 1881, which had been adopted by the company at a general meeting, and which shewed assets to the nominal amount of £90,552, and debts and liabilities to the amount of £29,846; the land, buildings, plant, and works being entered at £80,577. It further stated that since the date of the report the company had incurred considerable further losses, and that its account with its bankers was overdrawn by about £13,300. It further stated that on the 28th of July, 1881, the Petitioner had given to the bankers a mortgage on property of his own to secure £10,500, part of the overdraft, and that he and other directors were also indebted to the bankers in the further sum of £2000 on a guarantee given by them for the overdraft, and that by indenture dated the 14th of June, 1881, the company had agreed with the Petitioner to indemnify him against the guarantee and mortgage, and, on the request of the Petitioner, to procure the delivery to him of the mortgage and guarantee; that on or about the 21st of December, 1881, the Petitioner requested the company to procure the delivery to the Petitioner of the mortgage and guarantee; that the company had failed to comply with the request, and had no available moneys to discharge any part of its debt to the bank, and was unable to procure the release of the Petitioner's guarantee and mortgage; that the company was unable to pay its debts; that its business had for several years past been and was then being carried on at a loss, and that, on these and other grounds, it was just and equitable that the company should be wound up.

On the 10th of January, 1882, an order was made staying all

C. A. 1882 *In re* Vron Colliery Company.

further proceedings in the action till the petition had been heard.

On the 14th of January, 1882, the petition came on to be heard, and was supported by creditors, and an order for winding up was made.

Forrest gave notice of motion that he might be at liberty to proceed with his execution. The motion was heard before Vice-Chancellor *Bacon* on the 20th of January, 1882.

Levett, for the applicant.

Russell Roberts, contrà.

Bacon, V.C.:—

In my opinion this case is clearly covered by the law laid down in the decisions as to the effect of the 85th and 87th sections of the *Companies Act*, 1862. All the elements which are necessary to induce the Court to say that the proceedings under the execution may go on, are to be found in this case. The petition is presented not by the company but by the chairman of the company, and it contains a plain and distinct statement that the company is perfectly able to pay all its debts. Mr. *Russell Roberts* tries to make a distinction between what he calls available assets, and the other large properties possessed by the company. I can draw no such distinction. It is not only shewn in the balance sheet, but also in the petition, that they can pay their debts three times over. I cannot see any reason why this execution creditor should not be allowed to go on and reap the fruits of his execution.

J. B. D.

C. A.

The liquidator appealed. The appeal was heard on the 25th of January, 1882.

Russell Roberts, for the Appellant:—

The company is commercially insolvent, and in all probability its assets will not pay its debts, for it is impossible to suppose that the mining property will realize anything like the sum at which it is valued. The creditor is entitled to no preference over the other creditors: *Buckley* on Joint Stock Companies Acts (1); *In*

(1) 3rd Ed. p. 186.

re Bastow & Co. (1). The case cannot be brought within *Ex parte Railway Steel and Plant Company, In re Taylor* (2).

Levett, contrà :—

This is a petition by a fully paid-up shareholder, who alleges the company to be solvent, and it must be taken to be a proceeding taken for the benefit of the company, and in order to defeat the proceedings of the Respondent. It ought not, therefore, to be allowed to stand in our way. It is a mere device to keep the assets from a creditor. No doubt the execution creditor's right is taken away unless the Court gives him leave to enforce it, but there is a class of cases in which the Court will always give such leave. We come within the rule in *Buckley* on Joint Stock Companies Acts (3), and *In re Great Ship Company* (4), which indicates that the object of the Act was only to prevent the creditor from proceeding where his doing so would be unfair.

[JESSEL, M.R., referred to *Smith, Fleming, & Co.'s Case* (5) as containing a more distinct statement as to the policy of the Act.]

In re London Cotton Company (6) is in our favour.

[JESSEL, M.R. :—In that case there was an execution before the presentation of the petition and an unlawful resistance to the sheriff's taking possession.]

In re Bastow & Co. is almost on all fours with the present case.

[JESSEL, M.R. :—I do not think that it applies to the present case. If it did we should have to consider whether it ought to be followed.]

Ex parte Railway Steel and Plant Company, In re Taylor, is in our favour.

[JESSEL, M.R., referred to the second decision in that case, *In re Williams*, and asked how the two decisions could stand together.]

On page 189 a principle is laid down which shews that the two decisions are consistent. *In re Richards & Co.* (7) proceeds on

(1) Law Rep. 4 Eq. 681.
(2) 8 Ch. D. 183.
(3) 3rd Ed. p. 186.
(4) 4 D. J. & S. 63.
(5) Law Rep. 1 Ch. 538, 545.
(6) Law Rep. 2 Eq. 53.
(7) 11 Ch. D. 676.

C. A. 1882 — *In re* VRON COLLIERY COMPANY.

the same principle, and is approved in *In re Withernsea Brick-works* (1).

[JESSEL, M.R.:—Not on this point.

BRETT, L.J.:—In that case the company broke their word; you have nothing of that kind here.]

JESSEL, M.R.:—

This is an appeal from a decision of Vice-Chancellor *Bacon* allowing a creditor to proceed with an execution against the goods of the company. The 163rd section of the *Companies Act*, 1862, makes an execution issued against the effects of a company after the presentation of a winding-up petition void; but, according to the decided cases, this is subject to a discretionary power in the Court under sect. 85 to allow execution to issue. Here the execution was issued after the presentation of the petition. The case is the same where the execution has been issued before, but the sheriff has not taken possession till after the presentation of the petition.

The object of the Act has been well stated by Lord Justice *Turner* in *Smith, Fleming, & Co.'s Case* (2): "The main purpose of the Act, as I understand it, is the collection and distribution of the assets of companies for the general benefit of their creditors, and amongst the creditors *pari passu*; and this discretion of the Court ought, therefore, as I think, to be exercised, not for the benefit of any particular creditor or creditors but for the benefit of the general body of creditors interested under the Act." The Respondent says that this may be true as a general rule, but that there are special cases in which leave to proceed to execution will be given and that the present case is within the exceptions, because as he says the company is solvent, and the winding-up petition is in fact presented by the company for its own purposes. Whether the latter fact if proved would furnish a sufficient ground is a matter for grave consideration, for if a petition is *bonâ fide* presented for the purpose of obtaining a fair distribution of the assets and a winding-up order is made, I do not see why the fact that the petition was presented by or on behalf of the

(1) 16 Ch. D. 337. (2) Law Rep. 1 Ch. 538, 545.

company should induce the Court to interfere with the due administration of the assets under the order. But I do not consider the statement to be proved. The petition was advertised as a creditor's petition, and contains statements which seem to have been intended to shew the petitioner to be a creditor of the company. I think that he was not one, and that his petition could not be supported on that ground. He had given a mortgage and a guarantee for debts of the company to their bankers, and the company had undertaken to indemnify him. They broke that engagement, and the object of the Petitioner was to drive the company to pay the bankers and relieve him from his liability. He had, however, paid nothing on behalf of the company, and therefore was not a creditor. Then he says he is a shareholder, but he is a fully paid-up shareholder, and has no *locus standi* to apply for a winding-up order unless he alleges that there is a surplus and gives some evidence in support of the allegation, for otherwise he has no interest in a winding-up. There is no allegation in the petition that there will be a surplus, and the Petitioner is not a creditor, so the petition was demurrable. Creditors however came in and supported it, and a winding-up order was made. I think that the petition ought to have been amended by joining a creditor as a co-Petitioner before an order was made upon it; but we are not now concerned with the validity of that order, which is not under appeal, and I am of opinion that in substance it was right. It would have been made right in form as well as substance by the technical amendment I have just mentioned, for there is nothing to shew that it was collusively or improperly presented.

The second point urged by the Respondent is that the company is solvent. I do not think that this is proved. I think that in one sense the company is shewn to be insolvent, that is, it has no means of paying its debts at once. As to its means of ultimately paying them we have a balance-sheet set out shewing assets to the nominal amount of £90,552 and debts and liabilities not quite amounting to £30,000. If the assets could be realized at the sums at which they are valued the company could pay its debts three times over, but we must look at the items. The freehold property with the plant and works is valued at £80,577.

C. A. 1882 *In re* VRON COLLIERY COMPANY. Jessel, M.R.

What it is likely to realize only an expert can say, but I never in my own experience have known a mining property which has been worked at a loss sell for anything like the amount of the valuation. I am therefore of opinion that it is not shewn that the company will ultimately be able to pay its debts in full; and this ground of argument fails.

Another ground has also been taken, that the Respondent ought to be at liberty to issue execution because he gave time at the request of the company. But he has not shewn that he ever did give time in the sense of binding himself not to sue; he did nothing more than simply abstain from bringing an action. If he had issued a writ earlier, probably the winding-up petition would have been presented earlier, and the Respondent would have been in the same position as now. But supposing that time had been given at the request of the company I am not prepared to say that this would have been any ground for preferring the creditor. Cases decided by Courts of first instance were cited which lay down that the mere giving indulgence is a reason for preferring the creditor. I am not satisfied that these cases were rightly decided. It is not necessary to say on the present occasion whether they ought to be overruled. I only say that I am not satisfied that they ought to be upheld. I do not see why a creditor's allowing time to a company should place him in a better position than other creditors under a winding-up. So as to the cases in which a creditor who has been induced to delay his proceedings by false pretences has been held entitled to preference. I am not satisfied that they were well decided. A company does not make false pretences; its directors may have made them, but they are not agents of the company for the purpose of making false pretences. That question, however, does not arise on the present occasion, and I say no more than that I do not wish to be understood as approving of those decisions.

The result is that the order of the Vice-Chancellor must be discharged.

BRETT, L.J.:—

The case is one in which under the provisions of the *Companies Act*, 1862, the Respondent could not proceed with his execution

without the leave of the Court, and the question is whether that leave ought to have been given. The matter is one of judicial discretion, and leave ought not to be given unless there are special circumstances in favour of the execution creditor. The main ground relied on by Mr. *Levett* was that the Act was not intended to allow a party friendly to the company to defeat the rights of an execution creditor by a winding-up order. I give no opinion on the question whether if a winding-up petition was presented really on behalf of the company for the purpose of stopping the proceedings of a creditor, the company being solvent, the creditor ought not to be allowed to proceed, for I think that no such case is made out on the evidence. The case of *Ex parte Railway Steel and Plant Company, In re Taylor* (1), was referred to. In that case the Vice-Chancellor found as a matter of fact that the creditor had been requested by the company to postpone his action, and had accordingly postponed it, and that the assets of the company were sufficient to pay all its debts in full. No such facts are established here, so that case does not apply, and I decline to give any opinion whether the decision on those facts was right. In *In re Richards & Co.* (2) the creditor had delayed his proceedings on the faith of a promise by the company that they would not present a winding-up petition, and a petition was presented which was found as a matter of fact to have been in reality presented on behalf of the company. I give no opinion whether that case was rightly decided, but right or wrong it does not govern the present where the facts are quite different. The present case is not within any of the authorities cited, and I agree that the order of the Vice-Chancellor must be discharged.

Holker, L.J.:—

The Respondent relies on two grounds as special circumstances taking his case out of the general rule. First he says that the winding-up petition is not the petition of a creditor, but a petition presented by a shareholder for the purpose of defeating the execution, although the company is solvent. I agree with the Master of the Rolls and the Lord Justice that these facts are not made out. This was practically a creditor's petition. The peti-

(1) 8 Ch. D. 183. (2) 11 Ch. D. 676.

C. A. 1882

In re VRON COLLIERY COMPANY.

Holker, L.J.

tioner indeed was not legally a creditor, but he was under a heavy liability as surety for the company against which he was entitled to be indemnified, and which he could call on the company to satisfy. The petition, therefore, was substantially a petition by a creditor, it was supported by creditors, and a slight formal amendment would have made it a creditor's petition. The company evidently was commercially insolvent, and there is no proof that it is not insolvent in every sense of the word. The first ground taken by the Respondent therefore fails.

Then cases have been referred to which lay down that a creditor's having given indulgence to the company is a sufficient reason for allowing him to proceed with an execution after a winding-up order. I have great difficulty in acceding to that as a general proposition. Why should his having given indulgence give him an advantage over other creditors who may also have given indulgence? The facts of those cases are quite different from those of the present, and it is therefore unnecessary to say now whether they ought to be followed. I therefore do not say that they ought to be overruled, but I have great difficulty in saying that a creditor ought to be allowed to go on with his proceedings after a winding-up order because he has given indulgence to the company.

Solicitors for Appellant: *Kennedy, Hughes, & Kennedy.*
Solicitors for Respondent: *Mercer & Mercer.*

H. C. J.

In re WELD (A PERSON OF UNSOUND MIND).

C. A. 1882 Jan. 30.

Lunacy—Committee of Estate—Allowance without Account—Power to mortgage or deal with Allowance.

An order was made that the brother of a lunatic, who was committee of his estate, should be allowed to retain the family mansion and grounds and the heirlooms therein for his own occupation and use, and that of his unmarried sisters, and that £4000 a year should be allowed him for his expenses in reference thereto. The committee with his sisters occupied the mansion accordingly, and incurred heavy and, as it was alleged, unreasonable expenses about the establishment. The income being insufficient to pay the allowance, it fell into arrear, and the committee mortgaged the arrears. He subsequently was removed from being committee and became bankrupt, and a large amount of bills incurred in keeping up the establishment remained unpaid. A surplus having arisen applicable to payment of the arrears, the new committee presented a petition for direction as to its application:—

Held, that although the allowance was made to the former committee without any obligation to account, and with an intention indirectly to confer a benefit on him and his sisters, still it was an allowance made to a person in a fiduciary position for a particular purpose, and which he had no right to mortgage, and that the mortgagee could stand in no better position than the committee himself:

Held also, that the person to whom an allowance of this kind is made has no such right to arrears as will prevent the Court from dealing with them in such way as it may consider just, and, if the Court finds that the expenses incurred for the purposes for which the allowance was granted remain unpaid, it will stop the arrears, and make provision for payment of such expenses.

An inquiry was therefore directed as to which of the debts of the committee were properly incurred in keeping up the establishment at the mansion.

REGINALD J. WELD was found lunatic in April, 1876, and his father and his brother *Shireburn J. Weld* were appointed committees of his estate. On the death of his father, on the 8th of December, 1877, the lunatic became tenant for life in possession of the *Lulworth Castle* estates, producing a gross income of about £15,000 per annum, but subject to various deductions, and he also became entitled for life to divers heirlooms, including substantially the whole of the furniture in *Lulworth Castle*. By an order in lunacy made on the 20th of July, 1878, the custody of the estate was granted to the lunatic's brother, *Shireburn J. Weld*, he

C. A. 1882 — *In re* WELD (A PERSON OF UNSOUND MIND).

being restrained from receiving any part of the estate till further order, and *G. F. Eland* was appointed receiver of the rents. The circumstances of the lunatic having become entirely altered by the death of his father, a new scheme for his maintenance and the management of his estate became necessary. *Shireburn J. Weld* brought in before the Master the following proposal:—

"The said *Shireburn Joseph Weld* proposes that having regard to" [certain wishes expressed in the father's will] "an establishment should be kept up at the family residence of *Lulworth Castle*, suitable to the condition, standing and circumstances of the family, and for the purpose of preserving such castle and the gardens and grounds attached thereto in proper order and condition, so that if ever he, the said *Reginald Joseph Weld*, should return to a sane state of mind, he would find his family residence fit and ready for his occupation as the head of his family; that he, the said *Shireburn Joseph Weld*, should be at liberty to retain for the use of himself, as the eldest brother and heir-at-law of the said *Reginald Joseph Weld*, (together with his three unmarried sisters,) the use of *Lulworth Castle* and the said furniture and effects, including the said heirlooms therein, and the right of shooting over the said estate and the use of the several pieces of land, amounting in the whole to 152A. 1R. 5P. or thereabouts, set out in the 5th schedule, and the cottages, kennels, and land set out in the 6th schedule; and that for the purpose of enabling him to keep up the said castle and gardens and grounds a sum of £4000 per year, payable quarterly and in advance, should be allowed to him out of the income of the said *Reginald Joseph Weld*, such allowance to commence as from the 8th of December, 1877, and that out of such allowance the said *Shireburn J. Weld* should keep up the said castle, gardens, and grounds, and also keep the interior of the said castle and building occupied therewith in a good state of preservation, but that the repairs and renovations necessary at any time to the main structure of the said castle and buildings or the residue thereof, and all tithes, rates, and taxes payable in respect of the premises occupied by the said *Shireburn J. Weld* should be defrayed out of the income of the estates of the said *Reginald J Weld*." He went on to make certain other proposals as to making payments for certain charitable objects.

The Master by his report dated the 22nd of July, 1879, found as follows: "That it is fit and proper that the said *Shireburn J. Weld* should be at liberty to retain for his own occupation and use and that of his said sisters *Lulworth Castle* aforesaid, and the said furniture and effects, including the said heirlooms therein, and the gardens and grounds and premises set out in the 5th and 6th schedules hereto, and the right of shooting over the said estates, and that the sum of £4000 a year should be allowed to him from the 8th day of December, 1877, for his expenses in reference thereto."

By an order of the Lords Justices made on the 2nd of August, 1879, the report was confirmed, and an order was made, one clause of which was in the precise terms of the above finding. An allowance of £2000 for the maintenance of the lunatic, and several other allowances were made by this order, and *Shireburn J. Weld*, as committee of the estate, was authorized to make certain charitable payments to amounts not exceeding the sums therein mentioned, the total being £546 per annum. It was directed that the aforesaid allowances and payments should be made out of the income by the receiver, and that the allowances should be payable quarterly in advance.

Shireburn J. Weld with his unmarried sisters resided at *Lulworth Castle* from the death of their father, and he incurred considerable expenses in keeping up the establishment. The allowance of £4000 soon fell into arrear, the income, owing to circumstances which need not be mentioned, being for the time insufficient to provide for it.

By an order made on the 7th of August, 1880, the appointment of *Shireburn J. Weld* as committee of the estate was revoked, and *T. J. W. Blundell* was appointed committee under a like restraint from receiving any part of the estate. It was ordered that the mansion-house, furniture, and grounds should be kept up till further order. That the Master should settle a new scheme for the application of the income, and that in the meantime, until it was confirmed, the allowance of £4000 should be stayed as from the 8th of September, 1880, and no further payment made in respect thereof after the 8th of June, 1880, but that the other payments directed by the order of the 2nd of August, 1879,

C. A. 1882 *In re* WELD (A PERSON OF UNSOUND MIND).

should be continued. And it was ordered that no part of the arrears of the £4000 and £546 should be paid by the receiver without the sanction of the Master, and until certain bills owing by *Shireburn J. Weld*, and to be mentioned in an affidavit, should be discharged.

By a report dated the 20th of December, 1880, and confirmed on the 11th of January, 1881, the Master certified that *Shireburn J. Weld*, as committee of the estate, had, after the death of his father, made payments to a large amount for the purpose of keeping up the estates and defraying the expenses of management, including rates, taxes, and other out-goings, and that he had left in the office an account of his receipts and payments, which had been verified, and from which it appeared that £1593 was due to him. It was further certified that £6000 remained due to him for arrears of the £4546. That the receiver's account to the 31st of June, 1880, shewed a balance in hand of £1691, but that he had no funds in hand out of which he could make any payment to *Shireburn J. Weld*, and that, in fact, the £1691 had been applied in payment of current expenses. The Master submitted that it was desirable that under sect. 136 of the *Lunacy Regulation Act*, 1853, the committee should exercise a power which was vested in the lunatic of charging the estate with £5000 for his own benefit, that this sum when raised should be paid to the receiver, and that after certain payments therein-mentioned, the residue should be applied in part discharge of the £1593 and £6000.

The £5000 was accordingly raised, and the receiver had a balance of £3500 in hand, after making thereout the payments mentioned in the above order.

On the 13th of December, 1880, *Shireburn J. Weld* had become bankrupt, having executed the following securities in favour of *Henry Russell*:—(1.) A deed of the 26th of September, 1879, by which he assigned to *Russell* the arrears of the £4546 then due to him (which were therein stated to amount to about £5000), as security for £6000 therein mentioned to be advanced to him by *Russell* for his expenses in reference to the *Lulworth Castle* and property. (2.) A deed of the 17th of December, 1879, by which he assigned to *Russell*, by way of further security, the arrears

which had accrued since the 8th of September then last. (3.) A deed of the 28th of April, 1880, by which he assigned to *Russell*, by way of further security, the quarterly payment which had accrued due since the 8th of December, 1879.

In May, 1881, *Blundell*, the committee, presented a petition stating the above facts, and referring to an affidavit made by the receiver, from which it appeared that he had received notice of debts and liabilities incurred by *Shireburn J. Weld*, which ought to have been paid by him out of the allowances made to him under the order of the 2nd of August, 1879. These were set out in two schedules. The debts in part 1 of the first schedule amounted to £195, and were payments which ought to have been made to the charities mentioned in that order. The debts incurred in the second part of the 1st schedule, amounting to £4682, were debts which appeared to have been incurred for the purposes of keeping up *Lulworth Castle* during the continuance of the allowance of £4000. The debts in the third part, amounting to £710, had been incurred during the same period, but did not appear from the particulars furnished to the receiver to have any direct connection with keeping up the castle. The debts mentioned in the second schedule, amounting to £286, were due to servants employed about the castle, and the receiver had, under the authority of the Master, paid these sums and the greater part of the debts mentioned in the first part of the first schedule, such payments amounting in all to £508. The petition asked that directions might be given as to the application by the receiver of the residue of the £5000, which had been raised as mentioned above, and of any other moneys applicable for payment of the £1593 and £6000 found due to *Shireburn J. Weld*, having regard to the claims of *Russell*, of the trustee in bankruptcy, and of the creditors to whom the debts mentioned in the above schedules were due.

Russell had presented a petition for liberty to attend proceedings, and to make all such applications as he might be advised for the purpose of obtaining payment of what was due on his securities, and had on the 22nd of January, 1881, obtained an interim order that no payment should be made out of the arrears of the allowances of £4000 and £546 to *Shireburn J. Weld* or any person

C. A. 1882

In re WELD (A PERSON OF UNSOUND MIND).

claiming through him, or to any of his creditors, without notice to *Russell*.

The petition came on to be heard on the 6th of August, 1881, before Lord Justice *Cotton*, but was not disposed of, and now came on again.

J. Pearson, Q.C., and *Bagshawe*, for the Petitioner.

Creed, for the trustee in bankruptcy of *S. J. Weld*.

Ingle Joyce, for the next of kin.

Cookson, Q.C., and *Grosvenor Woods*, for *Russell*:—

We say that this was an allowance directed to be paid to the brother of the lunatic on the ground that the Court was doing what the lunatic if sane would have done. The allowance, it is true, was made subject to the performance of a particular duty, but the Court only interferes where the duty is not discharged, and subject to that the allowance belongs to the person for his own benefit. The receiver being unable to pay the allowance it was impossible for *Shireburn J. Weld* to keep up the establishment unless he borrowed money. If he had mortgaged the future payments the Court would have stopped the allowance, but there can be no ground for setting aside a mortgage of arrears which became due while the duty was discharged. The Court, if applied to, would have sanctioned such a mortgage.

[JESSEL, M.R.:—I entirely dissent from that proposition.]

In the case of a pension arrears may be mortgaged though not future payments.

[JESSEL, M.R.:—I do not see much analogy between that case and this.

BRETT, L.J.:—Nor do I. The same reasons do not apply to the two cases.]

JESSEL, M.R.:—

A case of this description does not often occur in the Lunacy jurisdiction, but I am sorry to say such cases are not uncommon in the Chancery Division. It arises from the circumstance of an

allowance without account being made by the Court to a person in a fiduciary position. The purpose for which the allowance is made is defined, and there are no doubt many cases, especially in the Chancery Division, where such an allowance is purposely made larger than is wanted for the purpose named with the object of indirectly benefiting the person to whom the allowance is made, the Court having no jurisdiction to benefit that person directly. A very common instance is the case of a man of large fortune leaving an infant eldest son who takes the great bulk of his property, but leaving an insufficient provision for his widow and younger children. There, in allowing maintenance for the eldest son the Court always had and always has regard to the position of the family, and makes a larger allowance than is absolutely necessary for the eldest son for the purpose of his maintenance and keeping up an establishment suitable for him, on the understanding that the widow and the younger children will live in the house and be maintained out of the allowance so made. When such an allowance is made of course no account is asked for so long as the establishment is kept up and the children are properly maintained. But if ever it came to the knowledge of the Court, and it has not unfrequently come to the knowledge of the Court, that the person to whom the allowance is made, instead of paying the bills for the establishment or the school bills for the children, was appropriating the money to his or her own use and allowing the purposes for which the Court intended the money to be applied to remain unfulfilled to this extent, that the bills for goods supplied or for the education of the children remained unpaid, the Court would at once stop any arrears of the allowance and see that the bills and costs of maintenance were paid. As I said before that application is not infrequent, and is usually made in Chambers, and by some person on behalf of the schoolmaster or other person who is entitled to be paid and who is left unpaid. In those cases, as a general rule, the Court proceeds further, and either takes security for the future proper application of the moneys paid, or removes the guardian and appoints another. It appears to me that a similar principle applies when an allowance is made in lunacy to a committee for a given purpose, but without account. If the allowance is of a definite sum, and the purpose is expressed, it is

C. A. 1882

In re WELD (A PERSON OF UNSOUND MIND).

Jessel, M.R.

well understood that the committee has the allowance made something beyond what would otherwise be allowed, with a view to some benefit either for himself or for some other member or members of the family. That is the motive, but the allowance is still an allowance made to a person in a fiduciary character, and for a definite purpose. And if the Court is informed that the purpose has not been carried out by paying the people who have supplied the goods which ought to be supplied for carrying out that purpose, the Court will not allow the arrears which otherwise would be payable to the committee to be paid to him, but will see that the persons who have supplied the goods are paid.

It follows from what I have said that a committee in that position cannot make a good security on the allowance. He ought not to mortgage it at all, and I think that, as a general rule, it would be a ground for removing a committee if the Court is informed that he has mortgaged the allowance. The object of making the allowance is not that he shall borrow money, but that he and the other members of the family intended to be benefited shall be properly maintained, and that a proper house and home shall be kept up for them, and for the lunatic in case he shall recover. If it should happen, as it happens not unfrequently in lunacy, that the income is not sufficient to accomplish all the objects which it is desired to accomplish (sometimes there is not even sufficient income for the maintenance of the lunatic, and sometimes though there may be enough for the maintenance of the lunatic there is not sufficient for the maintenance of himself and his infant children), it is by no means uncommon for the relatives to come forward and say, We will make up the income to the sum required out of our own pocket, and take our chance of being repaid if the income should hereafter increase. In such cases the Court does not give them a security. All the Court says is, If the income should hereafter increase, so as to leave a surplus, you shall be paid. With that view the Court often makes a nominal allowance of a larger amount than the income is sufficient to provide for, with a proviso, that a sum shall be paid not exceeding the annual income, and the arrears are nominal arrears only.

As regards the right of the committee or other person to whom

such an allowance is made, he has no legal right at all, he could not bring an action on the order of the Court; he could only apply to the Court for payment. It may be described as an equitable right, but it hardly amounts to that, for the Court can revoke it at any time *ab initio* so far as it has not been actually paid. For instance, there was a case in which certain certificates of railway stock were found amongst the lunatic's papers. It was thought that he was entitled to that stock, and an allowance was made on that assumption. It turned out that he was not so entitled, and when the mistake was discovered the whole scheme was reversed from the beginning, and the allowance altered. The ordering an allowance confers no absolute right on anybody, and therefore I desire that money-lenders and others should know that they cannot make advances on the faith of these orders except subject to the power of the Court of dealing with the allowance from the very first exactly as it thinks proper. That being so, it appears to me clear in the present case, that Mr. *Russell* has no better position than Mr. *Shireburn J. Weld* would have had if he had not become bankrupt.

In the present case there were two committees of the estate. One died, and thereupon proposals were brought before the Master for appointing the survivor, Mr. *Shireburn J. Weld*, as sole committee. The death of the other, who was entitled in remainder to the family estate, having entirely altered the state of things, it was necessary to make a new scheme for the maintenance of the lunatic and the management of the estate. Mr. *Shireburn J. Weld* brought before the Master a proposal which the Master approved. [His Lordship read the proposal and the finding of the Master, as given above.] The order follows the same words, and it confirms the report, and it orders in the very words of the Master's recommendation that the £4000 a year be allowed to the committee for his expenses in reference thereto. Having regard to that report and that order, to what purposes is the £4000 a year to be applied by the committee of the estate? For keeping up the establishment. What does that mean? What kind of establishment? It must mean an establishment suitable for a gentleman spending £4000 a year at *Lulworth Castle*, and must include a proper staff of servants, horses, and carriages, and

C. A. 1882

In re WELD (A PERSON OF UNSOUND MIND).

Jessel, M.R.

everything reasonably necessary for the maintenance of the establishment of a gentleman spending £4000 a year at *Lulworth Castle*. But it includes something more than that. It is quite plain on that order that the intention was that the committee, Mr. *Shireburn J. Weld*, and his three sisters, should live in the castle. It was intended to give them a benefit indirectly which could not be given to them directly, and the £4000 a year was allowed to enable Mr. *Shireburn J. Weld* to keep up such an establishment, including the maintenance of himself and his sisters as well as of the servants composing the establishment.

In all these cases we must look to what the real intention of the Court was. All parties must have understood that if Mr. *Shireburn J. Weld* had taken half the money and spent it in gambling and drinking, and had only spent the other half upon the establishment, that would not have been within the meaning of the order. It was intended that he should spend £4000 a year on the establishment, and that he and his sisters should get a personal benefit indirectly by living there free of cost. In that way, no doubt, they had a personal benefit, but they were not intended to have it in any other way. Then again, it never was intended and never is intended in these cases, where an allowance is given without account, to require that the recipient shall spend every farthing for the purposes mentioned in the order. If he does what is intended by the order the Court does not inquire whether he does or does not spend a few pounds for his personal benefit. But still the purpose is the keeping up the establishment, and the house and grounds in the mode pointed out.

That being so it appears to us that we should now inquire which of the debts mentioned in the second part of the first schedule, which are alleged to amount to £4682, have been incurred for this purpose, and have not been paid. It is quite possible that the Master may think, and reasonably think, that some of these debts are not within the purview of the order, or that some of them are extravagant and beyond what ought to be allowed. It is not for me to go into those details, but it is right for me to say that if there is any doubt on the question as to whether a sum should be allowed or not the Master should incline to allowance, and should take rather a liberal view with regard to those tradesme who supplied butcher's meat, and groceries, &c., to *Lulworth*

Castle. It is right that they should not go unpaid for goods supplied within the limits pointed out by the order as to amount, and reasonably supplied, having regard to the nature of the establishment to be kept up. This remark would apply even to matters not of strict necessity, but what are commonly called (I am not sure that they are always rightly so called) articles of luxury. Take the case of the wine bill (£870). It looks to me at first sight as too large a bill to be allowed, but it does not follow that the Master will not allow a substantial portion of it. If he thinks a fair allowance in this respect ought to be made for the head of the family and the sisters residing with him, of course that is part of the expenses of the establishment. The same remark applies to several of the other bills. One must recollect there are shootings and various other things to be kept up, and what is fairly supplied for those purposes, and reasonably supplied having regard to the total amount, should I think be allowed by the Master.

The order we propose to make will be in this form:—Refer it to the Master to ascertain which of the debts in the second part of the first schedule to the receiver's affidavit, and to what amounts respectively, were properly incurred in keeping up an establishment at *Lulworth Castle* suitable to the condition, standing, and circumstances of the family, and for the purpose of preserving such castle, and the garden and grounds attached thereto in proper order and condition, so that if the lunatic should return to the castle in a sane state of mind he might find his family residence fit and ready for his occupation as the head of his family, this Court being of opinion that the establishment includes a sufficient number of servants, horses and carriages and the expenses incident thereto, and includes the food and wine supplied to the head of the family for himself and his three sisters while living there, having regard to their annual total expenditure for the purposes aforesaid, not exceeding £4000 per annum. That means that he is to look to what the expenditure of a man having an income of £4000 ought reasonably to be supposed to be. The rest of the petition stands over until we get the report of the Master, because we shall not know until we get that report whether there is any, and if any, what surplus to be laid out hereafter. The £508 paid by the receiver will be allowed

C. A. 1882 *In re* WELD (A PERSON OF UNSOUND MIND).

him in passing his accounts, and treated as a payment on account of the arrears of the allowances.

BRETT, L.J.:—

I agree entirely with all my Lord has said. I only wish to add this most emphatically, that in my opinion no person to whom an allowance of any kind is made in lunacy has any right either legal or equitable to that allowance so as to enable him to deal with it in any manner that should fetter the power of the Court to deal with it in any way, and that therefore there is nothing which the recipient of such an allowance can convey by way of mortgage, and nothing which can pass to a trustee in bankruptcy of such a person so as to fetter the action of the Court, either in saying that the Court will pay, or that the Court will not pay, or in distributing the allowance which it still has under its hand precisely as if there had been no such mortgage or bankruptcy.

JESSEL, M.R.:—

I entirely concur in the observations of the Lord Justice *Brett*.

HOLKER, L.J.:—

I am of the same opinion.

Mr. *Cookson*:—

I ask on Mr. *Russell's* petition that he may be at liberty to attend the proceedings. He will only attend on the chance of adding his costs to his security.

JESSEL, M.R.:—

We never allow a creditor to attend. The solicitor of the committee will watch the proceedings. Mr. *Russell* can communicate any information to him, and he will no doubt bring all necessary facts before the Master, but we cannot give Mr. *Russell* liberty to attend.

Solicitors: *Palmer, Eland, & Nettleship; Harting, Son, & Ellis; Campbell, Reeves, & Hooper; G. S. & H. Brandon.*

H. C. J.

UNION BANK OF LONDON *v.* INGRAM.

C. A. 1882 Feb. 1.

[1876 U. 8.]

Mortgage—Decree for Foreclosure—Sale—Conveyancing and Law of Property Act, 1881, *s.* 25.

A decree for successive redemptions and foreclosures having been obtained in an action by a second mortgagee against the first mortgagee and several successive incumbrancers, the second mortgagee redeemed the first, and then applied for a sale of the mortgaged property:—

Held, that under the *Conveyancing and Law of Property Act*, 1881, s. 25, the Court has jurisdiction to order a sale of mortgaged property in a foreclosure or redemption action at any time before the suit is concluded by foreclosure absolute, and a sale was ordered.

THIS was an action by the *Union Bank of London*, as second mortgagees of certain property in *Middlesex*, against *Ingram*, first mortgagee in possession, six incumbrancers subsequent to the Plaintiffs, and *Hart*, the trustee in bankruptcy of the mortgagor, for redemption and foreclosure.

On the 10th of May, 1879, a complicated decree was made for successive redemptions and foreclosures in the regular form, the successive rights of redemption being given to the Plaintiffs, Miss *Leigh*, *C. J. Stephens*, *George Stagg*, *W. Johns*, *Sophia Robinson*, *Gibbs Drake* and *Tryon*, and *Hart* the trustee in bankruptcy.

On the 20th of April, 1881, the official referee found a balance of £9083 due to *Ingram*.

The Plaintiffs redeemed *Ingram*, and on the 21st of November, 1881, the official referee made a report, finding the total amount due to the Plaintiffs to be £23,219, exclusive of costs.

On the 3rd of January, 1882, an experienced land agent made an affidavit stating that he had recently surveyed the property, and that its utmost value was £13,500.

The bank applied under the *Conveyancing and Law of Property Act*, 1881, s. 25, to have a sale directed instead of a foreclosure. Mr. Justice *Kay* considered it doubtful whether there was jurisdiction under that section to direct a sale when a decree for foreclosure and redemption had been passed and entered. His

C. A. 1882

UNION BANK OF LONDON v. INGRAM.

Lordship accordingly declined to make the order, but suggested that the case should be taken to the Court of Appeal.

Ince, Q.C., and *Methold*, for the Bank :—

The power given by the *Conveyancing and Law of Property Act*, 1881, sect. 25, sub-s. 2, is more extensive than that given by 15 & 16 Vict. c. 86, s. 48, which empowers the Court to direct a sale instead of a foreclosure. The words "instead of a foreclosure" do not occur here. Even under the former Act it is not clear that what is now asked could not be done. In *Laslett* v. *Cliffe* (1) an order for sale was made on petition after a decree for foreclosure, although such an order had been refused in *Girdlestone* v. *Lavender* (2). We are only giving up a part of the benefit of the decree, for it is manifest that if it is worked out the property will be ours.

Freeman appeared for one of the subsequent incumbrancers, but did not oppose the application.

JESSEL, M.R. :—

I think that according to the true construction of the Act there is nothing to prevent the Court from directing a sale at any time before the foreclosure has become absolute. The Act is a remedial Act, one effect of it being to allow a mortgagor whose property is worth more than the mortgage-money, but who cannot raise it, to obtain a sale and get the benefit of the surplus. The Act being remedial is to be construed liberally. The Court has power to impose terms so as to take care that no injustice shall be done to anyone, and I think that the Legislature has given it jurisdiction to make the order at any time before foreclosure absolute.

As to the cases which have been cited I have two observations to make. First, they were under an enactment different, and I think materially different, in its terms from that under which we are acting; and secondly, they are conflicting decisions neither of which is binding on this Court, and as the law has been altered there is no need to say which of them we think correct.

(1) 2 Sm. & Giff. 278. (2) 9 Hare, App. liii.

C. A.
1882
UNION BANK OF LONDON v. INGRAM.

BRETT, L.J.:—

This is an enabling and remedial statute intended to give the Court a very beneficial power, and I do not see any reason to cut down the words of the enactment, which appear to me to be wide enough to authorize the Court to order a sale at any time before the action has been finally concluded. That appears to me to be the true construction of the Act. As regards *Girdlestone* v. *Lavender* (1), I think that the enactment under which that case was decided is materially different from the present; the words "instead of a foreclosure," being, as it seems to me, designedly omitted in the recent statute. We need not therefore consider which of the two conflicting decisions under the earlier statute is correct.

HOLKER, L.J., concurred.

Solicitors for Plaintiffs: *Bolton & Co.*
Solicitors for Miss *Leigh*: *Webster & Graham.*
Solicitors for other parties: *Makinson & Carpenter.*

H. C. J.

In re TANQUERAY-WILLAUME AND LANDAU.

C. A.
1881
KAY, J.
Sept. 28.
C. A.
1882
Feb. 7, 9.

Will—Charge of Debts—Direction to Executors to pay Debts—Devise to Executors—Inquiry as to Existence of Debts—Legal Estate—Trust to pay or permit to receive—Requisitions—Objection to Root of Title not too late though stipulated Time expired.

A testator directed that his debts should be paid by his executrix and executor thereinafter named. He then devised all his freehold and copyhold estates to his wife and son, and bequeathed to them his leaseholds and other personal estate and declared that his real and personal estates were devised and bequeathed to them "upon trust to pay the rents, issues, and profits, and the interest, dividends, and income of my said real and personal estates unto or permit the same to be received by my said wife during her life," and after her decease to raise and pay certain legacies to other persons which were to be treated as vested from his decease, and as to all the rest, residue and remainder of his real and personal estates after the death of his wife he devised and bequeathed the same to his said son, his heirs, executors,

(1) 9 Hare, App. liii.

C. A.
1882
In re TANQUERAY-WILLAUME AND LANDAU.

administrators, and assigns, according to the natures and qualities thereof, and empowered him to postpone payment of the legacies for two years from the widow's death, the legacies to carry interest from her death. The widow and son were appointed executors. The testator died in May, 1871, and the will was proved by the executors. In June, 1881, the widow and son put up for sale part of the freehold estate, under conditions of sale providing that requisitions must be delivered within ten days from the delivery of the abstract; time to be of the essence of the contract. The purchaser made a requisition that the legatees must release the estate from their legacies. The vendors refused to procure their concurrence, on the ground that the real estates were charged with debts, and that the vendors could sell discharged from the legacies. The purchaser then asked whether any debts remained unpaid. The vendors declined to answer the question, and the point was then raised, after the time for sending in requisitions had expired, whether any charge of debts was created. The vendors persisting in their refusal to answer the question whether any debts remained unpaid, the purchaser took out a summons to have it declared that no charge of debts was created by the will, and if it was, then that the vendors were bound to answer the inquiry as to debts.

Held, by *Kay*, J., that as the purchaser's objection went to the question whether the vendors had any power to sell he was not precluded by the conditions from raising it.

Held, further, that as the real estate was not devised to the executors in trust for other persons, nor devised to them beneficially in such a way as to give them equal beneficial interests, the question whether the direction to them to pay debts charged the real estate with debts was too doubtful for the title to be forced on the purchaser.

Held, on appeal, that the legal estate in the real property was not limited to the widow for life with remainder to the son, but was vested in the two as joint tenants in fee.

Doe v. *Biggs* (1) distinguished.

Held, further, that as the executors took the whole legal fee as joint tenants, the direction to them to pay debts charged the real estate with debts, though they took unequal beneficial interests in it.

Held, further, that where executors in whom the legal fee is vested are selling real estate charged with debts, a purchaser is not bound or entitled to inquire whether debts remain unpaid unless twenty years have elapsed from the testator's decease.

T. B. TANQUERAY-WILLAUME, by will dated the 25th of February, 1871, gave the following direction:—

"I direct my executrix and executor hereinafter named to pay all my just debts, funeral and testamentary expenses, as soon as conveniently may be after my decease."

The testator then, after making various dispositions of per-

(1) 2 Taunt. 109.

sonalty, devised to his wife, *Esther Tanqueray-Willaume*, and his son, *T. B. Tanqueray-Willaume* the younger, "trustees of this my will," all his real estates whatsoever and wheresoever of or to which he, or any person or persons in trust for him, was or were seised or entitled for an estate of freehold and inheritance, or which were of the nature of copyhold, and which he had power to dispose of or appoint by will (except estates vested in him in trust or by way of mortgage), to hold the same unto the said *Esther Tanqueray-Willaume* and *T. B. Tanqueray-Willaume* the younger, their heirs and assigns, according to the natures and qualities thereof respectively. And he bequeathed all his leasehold estates and all other his personal estate (except such part thereof as he had specifically disposed of by his will) unto the said *Esther Tanqueray-Willaume* and *T. B. Tanqueray-Willaume* the younger, their executors, administrators, and assigns, according to the natures and qualities thereof respectively. "And I declare that my said real and personal estates are so devised and bequeathed upon the trusts, intents, and purposes, and with, under, and subject to the powers, provisions, and declarations hereinafter expressed and declared concerning the same, that is to say, upon trust to pay the rents, issues, and profits, and the interest, dividends, and annual income of my said real and personal estates unto or permit the same to be received and taken by my said wife during her life, and from and after the decease of my said wife to raise and pay out of my said real and personal estates (subject to the proviso for postponing payment of the same hereinafter contained) to my daughter *Catherine*, the wife of *Charles Frederick Murray*, Esq., the legacy or sum of £2000 sterling for her sole and separate use, and her receipt alone shall be a sufficient discharge; and to my son *Frederick Tanqueray-Willaume*, the legacy or sum of £3000 sterling. And I do hereby declare that both the said legacies shall be considered as vested legacies at the time of my decease, notwithstanding the proviso hereinafter contained for postponement of the payment of the same. And as to all the rest, residue, and remainder of my said real and personal estates after the death of my said wife, I give, devise, and bequeath the same unto my said son *T. B. Tanqueray-Willaume* the younger, his heirs, executors, administrators, and

C. A. 1882 *In re* TANQUERAY-WILLAUME AND LANDAU.

assigns, according to the natures and qualities thereof. Provided always, and my will is, that my said son, *T. B. Tanqueray-Willaume* the younger, shall not be obliged or compelled to pay the said legacies of £2000 and £3000 to my said daughter *Catherine Murray* and *Frederick Tanqueray-Willaume* at the end of twelve months from the date of the decease of my said wife, but shall be at liberty to pay the same legacies or either of them at any time or times most convenient to himself within two years next after the decease of my said wife, together with interest thereon respectively at the rate of 4 per cent. per annum, to be computed from the day of the death of my said wife, such interest in the meantime to be paid to them the said legatees half-yearly . . . . . And I do hereby appoint my said wife and my son, *T. B. Tanqueray-Willaume* the younger, executrix and executor of this my will."

The testator died on the 13th of May, 1871, and his will was proved by the executors on the 17th of the following month. On the 14th of June, 1881, they put up for sale by auction a part of the testator's freehold estate. The twelfth condition provided in the usual way that objections and requisitions must be sent in within ten days from the delivery of the abstract, time to be of the essence of the contract, and that in default of such objections and requisitions (if none) and subject thereto (if any) the purchaser should be deemed to have accepted the title. Mr. *Landau* became the purchaser. An abstract was delivered on the 23rd of June, and requisitions were sent in, all of which were answered to the purchaser's satisfaction, except the following:—"Particulars of the legacies directed to be raised and paid by the will of *T. B. Tanqueray Willaume* out of his real and personal estate must be given, and the receipts and discharges produced." The vendor, in reply, gave the particulars of the legacies, and stated that they would not be paid till the death of the widow. The purchaser thereupon required that the legatees should join in the conveyance. The vendors' solicitors on the 28th of June replied that the vendors as executors and devisees in trust under a will which charged the testator's debts on his real estate could sell without the concurrence of the legatees, whose concurrence they therefore declined to procure. On the 3rd of August the

purchaser delivered the following requisition: "The power of the vendors as executors and devisees to sell in this case, free from the legacies, would only remain in them if debts of the testator still remain unpaid. Considering that the testator died more than ten years ago this seems highly improbable to us, and either the purchaser must be furnished with debts still remaining unpaid, or the legatees and the tenant for life must join in the conveyance, and release their respective interests." The vendors' solicitors replied, "The purchaser is not concerned to inquire whether or not debts of the testator still remain unpaid, and lapse of time is no bar to the exercise of the power to sell: *Sabin* v. *Heape*" (1).

A meeting then took place, at which the objection was raised that there was no charge of debts, and the question whether the vendors were bound to answer the inquiry as to debts was discussed. After further correspondence the vendors declined to answer any question as to the testator's debts, but offered (without prejudice) to produce a receipt for the daughter's legacy and give an undertaking to procure a release from the son's legacy, or to invest sums of £2000 and £3000 to indemnify the purchaser against the legacies.

The purchaser took out a summons under the *Vendor and Purchaser Act*, 1874, asking for a declaration that no charge of debts was created by the will, or if there was, then that the vendors were bound to answer the inquiry whether there remained any debts unpaid.

The summons was adjourned into Court in the Long Vacation.

The summons was heard before Mr. Justice *Kay* on the 28th of September, 1881 (2).

Marten, Q.C., and *Frank Evans*, for the summons:—

There is no charge of debts: *Cook* v. *Dawson* (3); *Douce* v. *Lady Torrington* (4).

[KAY, J., referred to *Harris* v. *Watkins* (5), and *Henvell* v. *Whitaker* (6)].

If the testator directs his debts to be paid by his executors

(1) 27 Beav. 553.
(2) *Ex relatione* Mr. *Frank Evans*.
(3) 29 Beav. 123.
(4) 2 My. & K. 600.
(5) Kay, 438.
(6) 3 Russ. 343.

C. A. 1882 *In re* TANQUERAY-WILLAUME AND LANDAU.

and devises his real estate to one of them, there is no charge, *Warren* v. *Davies* (1): and if it be devised to both there is only a *primâ facie* intention to create one, *Wasse* v. *Heslington* (2): which is rebutted if unequal interests are given to the executors: *Bailey* v. *Bailey* (3). The case of *Symons* v. *James* (4) bears on the effect of the introductory words. Under the limitations of this will the widow takes the legal estate for her life, and on her death there is a fresh devise to the son, who takes the legal fee in remainder as beneficial devisee, and as such is empowered to postpone the payment of the legacies. The gifts to the executors are for their own benefit and unequal; it can make no difference whether the inequality is between different properties, as in *Wasse* v. *Heslington*, or between different interests in the same property. In all cases where a charge has been held to be created the gift has been to the executors equally for their own benefit, or to them in trust for other persons.

But if there is a charge there can only be a right to sell under it if debts are still owing. If executors sell when there are none they are committing a breach of trust. After ten years it is to be presumed that the debts have been paid. The refusal to answer strengthens this presumption, and the offer to invest money to meet the legacies shews that the sale is not for payment of debts. In *Sabin* v. *Heape* (5) Lord *Romilly* held that the vendors were not bound to answer as to debts after a lapse of twenty-seven years from the death, but that case is doubted by Mr. *Dart*, Vendors and Purchasers (6), and *Forbes* v. *Peacock* (7), on which the Master of the Rolls relied, does not support his decision, as there the trust was to sell to pay debts and legacies, and undoubtedly the legacies were unpaid; so there was no question as to the right to sell but only as to the power to give receipts, as is explained in *Carlyon* v. *Truscott* (8). According to *Stroughill* v. *Anstey* (9) the lapse of time puts the purchaser on inquiry, and if not bound to inquire he is at all events entitled to do so.

(1) 2 My. & K. 49.
(2) 3 My. & K. 495.
(3) 12 Ch. D. 268.
(4) 2 Y. & C. Ch. 301.
(5) 27 Beav. 553.
(6) 5th Ed. pp. 60, 61.
(7) 1 Ph. 717.
(8) Law Rep. 20 Eq. 348.
(9) 1 D. M. & G. 635.

Hemming, Q.C., and *E. Martin*, for the vendors:—

There is a charge of debts, the executors being directed to pay the debts, and the real estate being devised to them. That the devise is to them as trustees makes no difference. The law is fully explained by Mr. Justice *Fry* in *Bailey* v. *Bailey* (1).

[KAY, J.:—Has the rule ever been held to apply where the executors neither take equally and beneficially nor as trustees for other persons?]

It is enough if the property is given to the executors beneficially or as trustees.

[KAY, J.:—Where unequal benefits are given to the executors it has been held that there is no charge.]

That has no application when the executors take the property as co-trustees. Then as to answering the requisition as to debts, *Sabin* v. *Heape* (2) is decisive.

[KAY, J.:—I cannot reconcile that decision with the observations of Lord *St. Leonards* in *Stroughill* v. *Anstey* (3)].

Then the objection that there was no charge was taken too late, and time is made of the essence.

Marten, in reply, on the question whether the objection was still open:—

The condition does not apply to objections going to the root of the title: *Want* v. *Stallibrass* (4). If subsequent facts shew a bad title or no title, the purchaser may raise the objection at any time: *Warde* v. *Dixon* (5).

KAY, J.:—

This case appears to me to be one of considerable doubt, but I will give my opinion upon it at once. By the will it is provided thus: "I direct my executrix and executor hereinafter named to pay all my just debts," and then comes a devise practically of all the real and personal estate to the wife and son of the testator upon

(1) 12 Ch. D. 268, 273.
(2) 27 Beav. 553.
(3) 1 D. M. & G. 635.
(4) Law Rep. 8 Ex. 175.
(5) 28 L. J. (Ch.) 315.

C. A. 1882 *In re* TANQUERAY-WILLAUME AND LANDAU. Kay, J.

trust to pay the income to the wife for life and, after her death, to raise certain legacies. Then there comes this: "As to all the rest, residue, and remainder of my said real and personal estate after the death of my wife, I give, devise, and bequeath the same unto my said son;" and at the end of the will the testator appoints the wife and that son executrix and executor, the result being that the whole of the estate real and personal, is given to those persons named as executrix and executor upon trust for one of them for life and then to raise certain legacies for other persons, and then the residue is given to the executor absolutely. Now the rule, by which executors take an implied power of sale in a case of this kind, is this. If there be a charge of debts that implies a power of sale. But the first question is whether there is a charge or not? I find the rule as laid down in the case of *Harris* v. *Watkins* (1) to be this, that if there be a direction that the debts shall be paid by the executors, not that they "shall be paid," but that they "shall be paid by the executors," that, says Lord *Hatherley*, implies an equal liability, and then if unequal gifts are made to them, as occurred in *Wasse* v. *Heslington* (2), that rebuts the presumption that there is any charge upon the property so devised to them. I asked if there were any cases in which there being a direction in the beginning of the will that the debts shall be paid by the executors, those words have been held to imply a charge upon property afterwards devised to them except in the case where the devise to them was of absolutely equal interests, and I have not been furnished with any such case, and according to the language which I have read of Lord *Hatherley*, unless the devise is to them of absolutely equal interests, the presumption of a charge of debts and an implied power of sale does not arise. Now, in this case, I need not say more than this—that I am not satisfied that under this will there is that implied charge of debts and power of selling the property devised to these executors, because, although the bulk of the property is to be taken by the executors beneficially, subject to certain charges, they do not take equally. Anything but that. The wife takes a life interest in the whole, and then the son takes everything which is left absolutely. Those are not equal interests to

(1) Kay, 438. (2) 3 My. & K. 495.

the executrix and executor, and, according to the words of Lord *Hatherley* in *Harris* v. *Watkins* (1), which I have already read, a direction that the debts shall be paid by the executors implies an equal liability, and then if unequal gifts are made to them that does not raise by implication a charge upon the property so devised to them. Therefore, upon the whole, my opinion upon the first point is that this is not a case in which there is an implied charge, and therefore there is no implied power of sale in these executors to raise debts.

The second point is of more difficulty because of the case of *Sabin* v. *Heape* (2), in which Lord *Romilly* seems to have held that twenty-six years after the death of a testator where there was such an implied power of sale, the executor might sell and might refuse to answer the question whether there were debts existing or not. Of course I have no power to overrule that decision, and unless it be overruled I should be bound to follow it in a case which was exactly like it. I must say it seems to me a little unreasonable that after so long a lapse of time, the purchaser should not be allowed to ask that question, because I suppose no one could deny or doubt for a moment that if the debts had all been paid the power of sale would be at an end. However, it is not necessary for me to decide that point, because my opinion upon the first point is in favour of the objection raised by the purchaser. I think the condition in these conditions of sale does not prevent the purchaser from raising an objection of that kind, because it goes to the root of the whole matter. If it should be the case, as I am at present inclined to think, that there is no implied charge of debts or implied power of sale at all, then the executors, who are professing to sell under that implied power, have no power to sell whatever, and that, it appears to me, is an objection which the purchaser is at liberty to raise. In my opinion this is a title too doubtful for the Court to compel the purchaser to accept. The costs of the application must be paid by the vendors.

The vendors appealed. The appeal came on to be heard on the 7th of February, 1882.

(1) Kay, 438. (2) 27 Beav. 553.

C. A.
1882
In re TANQUERAY-WILLAUME AND LANDAU.

Hemming, Q.C., and *E. Martin*, for the Appellants:—

The Judge below ought to have disallowed the objection to the title on the ground of its not being raised till after the time allowed for requisitions.

[JESSEL, M.R.:—The objection goes to the root of the title; moreover, it is raised by the summons and the agreed state of facts. The question is open.]

The view that there was no charge of debts is not sustainable. Mr. Justice *Kay* relied on the dictum in *Harris* v. *Watkins* (1), but that is founded on *Symons* v. *James* (2) and *Wasse* v. *Heslington* (3), and only applies where unequal portions of real estate are devised to the executors beneficially, and not to a case where the whole estate is vested in them as trustees. If they had taken only the legal estate and the beneficial interest had been given to other persons in unequal portions, there would still have been a charge: *Hartland* v. *Murrell* (4), and it can make no difference that they themselves are among the beneficiaries. All that is required for a charge is that there should be a devise of the estate to the executors jointly with a direction to them to pay debts: *Henvell* v. *Whitaker* (5); *Finch* v. *Hattersley* (6); *Warren* v. *Davies* (7). The law is correctly summed up by Mr. Justice *Fry* in *Bailey* v. *Bailey* (8). When the executors take the legal estate it is immaterial what the equitable dispositions are. There being then a charge of debts the executors had power to sell and give receipts, and the period which has elapsed is far too short to raise a presumption that the debts have been paid. A much longer period was held insufficient in *Sabin* v. *Heape* (9). The purchaser ought, therefore, to be compelled to take the title.

Marten, Q.C., and *Frank Evans*, *contrà*:—

The vendors cannot sell unless there is a charge of debts and debts remaining unpaid. We say that here there was no charge. In order that a direction to executors to pay debts may create a

(1) Kay, 438, 448.
(2) 2 Y. & C. Ch. 301.
(3) 3 My. & K. 495.
(4) 27 Beav. 204.
(5) 3 Russ. 343.
(6) Ibid. 345, n.
(7) 2 My. & K. 49.
(8) 12 Ch. D. 268, 273.
(9) 27 Beav. 553.

charge, there must be a devise vesting the real estate in them: *Cook* v. *Dawson* (1). A devise to them with a direction to pay debts does not always create a charge. The whole will must be looked at to ascertain the intention: *Symons* v. *James* (2); and even a direction that debts shall be paid not saying by whom and where the real estate was devised to the executors has been held to refer only to personal estate: *Douce* v. *Lady Torrington* (3). The rule laid down by Lord *Hatherley* in *Harris* v. *Watkins* (4) is supported by the authorities. *Wasse* v. *Heslington* (5) turned on the fact of the executors taking unequal benefits.

[JESSEL, M.R.:—Separate devises were made to them.]

Some of the real estate was given to them jointly. *Warren* v. *Davies* (6) supports the same view. Here the estate is not devised to the widow and son jointly. The widow takes the whole legal estate for life: *Doe* v. *Biggs* (7); *Baker* v. *White* (8). Even supposing that the executors take the legal estate jointly during her life, the son takes the whole legal estate in remainder. There is a fresh devise to him, and the power of postponing payment of the legacies is given to him, not to the trustees. But suppose there is a charge, the vendors must answer as to the existence of debts. Even in the case of a trust for sale there is no authority to sell where there are no debts: *Carlyon* v. *Truscott* (9). The vendors therefore are bound to answer the question as to the existence of debts. *Sabin* v. *Heape* (10) is the only case which decides the contrary. *Forbes* v. *Peacock* (11) does not support the decision in *Sabin* v. *Heape*, for in that case there was no doubt of the power to sell, the only question was as to the power to give receipts. In *Dart's* Vendors and Purchasers (12) the opinion is expressed that a vendor is bound to answer as to debts. Lord *St. Leonards*, in *Stroughill* v. *Anstey* (13), says that a purchaser is put upon inquiry whether there are debts when the sale takes

(1) 29 Beav. 123.
(2) 2 Y. & C. Ch. 301.
(3) 2 My. & K. 600.
(4) Kay, 438, 448.
(5) 3 My. & K. 495.
(6) 2 My. & K. 49.
(7) 2 Taunt. 109.
(8) Law Rep. 20 Eq. 166.
(9) Ibid. 348.
(10) 27 Beav. 553.
(11) 1 Ph. 717.
(12) 5th Ed. pp. 60, 61.
(13) 1 D. M. & G. 635, 654.

C. A. 1882 — *In re* TANQUERAY-WILLAUME AND LANDAU.

place a long time after the testator's death. At all events, the title is too doubtful to be forced on a purchaser: *Collier* v. *McBean* (1); *Palmer* v. *Locke* (2).

[JESSEL, M.R., referred to *Alexander* v. *Mills* (3).]

JESSEL, M.R.:—

This is an appeal from the decision of Mr. Justice *Kay*, in effect declaring that the vendors cannot make a good title. He arrived at that decision because he thought himself bound by a *dictum* in *Harris* v. *Watkins* (4).

Several questions were argued before us, the two most important of which are, first, whether under this will there is a charge of the testator's debts on his freehold estate; and, secondly, whether, after the lapse of ten years and a half, or thereabouts, there is any presumption that the debts have been paid; so that assuming them to have been paid, the purchaser would take with notice that they had been paid, and that a sale for payment of them was unauthorized.

The decision of the first question involves a decision of some others. The first point to be considered is, under what circumstances does a direction to pay debts charge them upon the testator's freehold estates. I think that the law on that point is correctly stated by Mr. Justice *Fry* in *Bailey* v. *Bailey* (5) in the following passage, which I refer to without giving any opinion as to the rest of the judgment. "I do not think that there is any conflict in the authorities. They appear to me to come to this, that where there is a direction that the executors shall pay the testator's debts, followed by a gift of all his real estate to them, either beneficially or on trust, all the debts will be payable out of all the estate so given to them. The same rule applies whether the executors take the whole beneficial interest, as in *Henvell* v. *Whitaker* (6), or only a life interest, as in *Finch* v. *Hattersley* (7), or no beneficial interest at all, as in *Hartland* v. *Murrell* (8)." That being the rule, the only question we have to consider in this

(1) Law Rep. 1 Ch. 81.
(2) 18 Ch. D. 381.
(3) Law Rep. 6 Ch. 124.
(4) Kay, 438, 448.
(5) 12 Ch. D. 268, 273.
(6) 3 Russ. 343.
(7) Ibid. 345, n.
(8) 27 Beav. 204.

case is, first, is there a direction to the executors to pay the debts; and, secondly, is the real estate given to them. I have not forgotten the argument of the Respondents as to the effect of a charge of debts. No doubt it was held in *Doe* v. *Hughes* (1) that a direction that debts should be paid only created an equitable charge and did not enable the executors to give the legal estate to a purchaser. Assuming that to be now correct law, and that a charge alone would not enable the executors to pass the legal estate, still, in all cases where there is a devise of the legal estate to the executors, they can give the legal estate, and it appears to me that there is no distinction whatever between a devise of estates to executors, subject to a charge of debts with the implied power of sale which follows from it, and a trust for payment of debts where the legal estate is expressly devised to trustees for the purpose of making such payment. In the case of such a trust it is perfectly well established that where the death is recent a purchaser ought not to inquire, and does not inquire, whether there are debts or not, and if he does not inquire, and has no notice that the debts are paid, he is quite safe. In the same way where there is a charge of debts with an implied power of sale, and the purchaser gets the legal estate, he would be protected by a Court of Equity whether there are debts or not, unless he has knowledge that there are no such debts.

The next point is, whether in this case the executors do take the legal estate. That will depend upon the construction of this particular will. I was rather surprised that the point was argued, because there is so much in this will to shew that they do. First of all the testator gives and devises to his wife and son, the trustees of his will, all his real estate "whatsoever and wheresoever of or to which I or any other person or persons in trust for me am, is, or are seised or entitled." That is, he gives them not only his freehold estates in which he has the legal estate, but he gives them also the freehold estates of which he has only an equitable estate, to be held upon trusts. It is plain that in so doing he intends to give possession of all his real estate to his trustees, and to hold them to be mere conduit pipes would make nonsense of this part of the will. Then he goes on to say,

(1) 6 Ex. 223.

C. A.
1882
In re TANQUERAY-WILLAUME AND LANDAU.
Jessel, M.R.

to hold the same to them, their heirs and assigns, and he declares that they shall hold the estates "upon trust to pay the rents, issues, and profits, and the interest, dividends, and annual income of my said real and personal estates unto or permit the same to be received and taken by my said wife during her life," and then, after her death, to raise and pay certain legacies, and then there is a gift of all the rest and residue to his son, with a power to the son to postpone payment of the legacies for two years after the wife's death. Reliance was placed on the words "pay unto or permit the same to be received by," and the case of *Doe* v. *Biggs* (1) was cited as an authority to shew that the wife would take the legal estate.

In the first place, as has been often observed, the *Statute of Uses* does not apply to wills. It is used sometimes as a mode of construing wills where it is obvious that the testator, so to say, had the statute in his mind. For instance, if you found a devise to trustees and their heirs to the use of *A. B.* for life, and after the determination of that estate in his lifetime to the use of trustees during his life to preserve contingent remainders, with remainder to the use of the first and other sons of *A. B.* in tail, you would say at once that the testator intended his will to operate under the *Statute of Uses*, and that the legal estate would go to the tenant for life, and the trustees would not take the legal fee. In that way the statute is made use of in construing the will. Now in *Doe* v. *Biggs* there was nothing more in the will than a gift to trustees to pay to or permit and suffer a lady to take the rents, and the Court of Common Pleas said that she could not be suffered to take the rents unless she had the legal estate, and that she therefore took that estate. This view contradicted the first part of the trust, because the trustees could not pay without having the legal estate, and the Court cut the knot by saying that in a will the last words must prevail, and therefore the first words must be rejected. Such a case as that, decided on such narrow grounds, cannot be treated as establishing any principle applicable to other cases. Here we have a wholly distinguishable case. The wife is one of the trustees, effect therefore can be given to both sets of words; the other trustee having a legal estate as joint

(1) 2 Taunt. 109.

tenant could pay to her, or he can permit her to receive, which she, as one of the joint tenants, is competent to do. There is, therefore, no need to apply the rule of thumb and say that the latter words are inconsistent with the former, and are to prevail. There is no inconsistency, and consequently the case of *Doe* v. *Biggs* (1) has no application, and the legal estate remains in the trustees. There is, moreover, a trust to pay legacies, which involves necessarily some estate in the trustees who are to raise and pay them. No doubt this could be done under a power, but the rule is that where there is a devise to trustees and their heirs, and they have some duty to perform requiring the legal estate, they take the legal estate and not merely a power. Then reliance was placed upon the power to the son to delay payment and the gift to the son of the residue, but the gift to the son of the residue is not a new gift of the real estate, it is only a gift of the equitable interest in remainder, and the power to the son to delay the payment is not inconsistent with his being trustee, for in the case put he would be the surviving trustee. It is after the death of the wife, and he being the surviving trustee there is nothing to shew that he is not to pay as trustee. For these reasons, it appears to me to be clear that the trustees take the legal fee as joint tenants.

Then, as they take the legal estate, it is utterly immaterial whether or not they take the beneficial interest. If they take the legal estate in trust for other people, the trust for other people does not negative the intention that they should sell to pay debts, and why should the trust for themselves negative it? It seems to me, therefore, that when once you get to the rule that a direction to pay debts confers upon the executors a power of sale over real estate devised to them as joint tenants, there is nothing to take this case out of that rule.

The case then stands thus. A direction to "my executors to pay my debts," has been held to mean a direction to them to pay out of the personal estate, but if it is followed by a devise of real estate to the executors, either as such or in their own names, it is a direction to them to pay out of that estate as well as out of the personal estate, and the real estate is charged. In the present case the legal estate is vested in the executors. We have, there-

(1) 2 Taunt. 109.

C. A. 1882

In re TANQUERAY-WILLAUME AND LANDAU.

Jessel, M.R.

fore, here a good charge of debts, a good power of sale and a good legal estate.

The only remaining point is what period of time is sufficient to raise a presumption that the debts have been paid. Now, upon that point and on that point only I differ from *Sabin* v. *Heape* (1). I think it is clear that ten years and a half are not sufficient, but, as has been said, a line must be drawn somewhere. The question is where? In *Sabin* v. *Heape* the late Master of the Rolls held that the lapse of twenty-seven years did not raise the presumption. I think that period too long. In *Forbes* v. *Peacock* (2) the period was twenty-five years, which the Vice-Chancellor appears to have considered too long. I think it desirable that a rule should be laid down upon which parties may act without having to come to a Court of Equity, and in my opinion the reasonable period is twenty years. The reason why I say twenty years is this,—that is the period of limitation for a specialty debt, and we know as a fact that most landowners owe mortgage debts. It therefore seems reasonable to say that after the lapse of twenty years, which is sufficient to bar mortgage debts and all other specialty debts, there is a presumption that the debts are paid, especially when you find a beneficiary in the enjoyment of the estate,—a circumstance mentioned by Lord *St. Leonards* in *Stroughhill* v. *Anstey* (3). In this case I may say it is not so, because the widow is a trustee, and therefore it cannot be said that her being in possession of the estate shews anything; but where you find a beneficiary in possession and twenty years have elapsed, I think it is fair to presume that the debts have been paid, and in such a case I think that a purchaser is bound to inquire.

It follows from what I have said that in my opinion the title is good, and the appeal ought to be allowed.

BRETT, L.J.:—

In this case there has been a contract for the purchase and sale of land, and the purchaser made the following requisition: "The power of the vendors as executors and devisees to sell in this case free from the legacies would only remain in them if debts of the testator still remain unpaid. Considering that the testator died

(1) 27 Beav. 553. (2) 12 Sim. 528. (3) 1 D. M. & G. 654.

more than ten years ago this seems highly improbable to us, and either the purchaser must be furnished with debts still remaining unpaid, or the legatees and the tenant for life must join in the conveyance and release their respective interests." The answer was: "The purchaser is not concerned to inquire whether or not the debts of the testator still remain unpaid." Upon that answer the purchaser assumes the right not to accept the title. The question raised therefore is, whether that requisition is a material one or not. It is argued on the one side that it is material, because it is said if there are no debts in existence then the purchaser will have a bad title to the property if he accepts it. On the other side it is said that it is wholly immaterial to him whether there are debts or not, because whether there are debts or not the title given to him will under the circumstances of the case be equally good.

The first question is whether the testator's debts were charged upon his real estate, and that depends upon the construction of the will.

Now, in order to help us to construe this will a great number of cases were cited on one side and the other, but whenever one of those cases was disagreeable to the person against whom it had been cited, he answered by saying it is a decision upon another will with provisions different from those of the present will, and therefore can be no authority for the construction of this will. To some extent all reported cases upon the construction of documents are open to that objection, but still they are useful. The only way in which the Court can make them useful is to see whether there can be elicited from them any rule of construction applicable to other cases in which similar words occur. It is of no use, to my mind, to discuss such cases, and to say whether one would have agreed with the learned Judges who decided them as to every part of the case. The only use of them is to see whether from the grounds given for the decision a rule of construction can be deduced, and if there are cases laying down a rule of construction which has been in the books for a number of years and has never been disputed, it ought, as it seems to me, to be assumed that in subsequent conveyances and wills it was intended to use the expressions referred to in those cases in the sense in which they have been construed in the cases. Now, it seems to me that

C. A. 1882 *In re* TANQUERAY-WILLAUME AND LANDAU. Brett, L.J.

a reasonable and fair general rule of construction can be deduced from the decided cases, and that this rule is well stated in *Hartland* v. *Murrell* (1). There the Master of the Rolls says: "I am of opinion that when a testator devises all his real estate to his executors and directs them to pay all his debts, that constitutes a charge on the real estate, although they take no beneficial interest in it." But then it was said that *Wasse* v. *Heslington* (2) was inconsistent with that rule. On one side we were asked to entirely disagree with *Wasse* v. *Heslington*, and on the other side we were asked to accept *Wasse* v. *Heslington* and to disagree absolutely with *Hartland* v. *Murrell*. Upon hearing those two cases read it seemed to me that you might extract from them a very good rule; viz., that where a gift is in the form mentioned in *Hartland* v. *Murrell* the debts are charged upon the real estate, unless upon other parts of the will a contrary intention clearly appears. The rule, as stated in *Hartland* v. *Murrell*, with that proviso or condition attached to it, seems to me to be consistent with the authorities, and to be well stated in the passage from *Bailey* v. *Bailey* (3), which was read by the Master of the Rolls. It seems to me that wherever a testator devises all his real estates to his executors and directs them to pay his debts, the debts are charged on the real estate, whatever may be the trusts declared of that real estate, unless upon the whole will you can clearly find a contrary intention. It was argued that this case was not brought within the canon, because in this case the real estate was not given to the executors, in support of which *Doe* v. *Biggs* (4) was relied on. I am not at all inclined to dispute the authority of that case, but it appears to me to have no application to the present. Here it appears to me that the trustees take the legal estate, subject to certain trusts imposed upon it, in their hands. Therefore the case is clearly to my mind within the canon, and I can see nothing in it to shew a clear intention to the contrary. It is not therefore within the exception or proviso, it is within the original rule, and the debts are charged upon the real estate.

Then it is said that after the lapse of ten years the purchaser must in prudence ask whether there were debts existing, because if there were not his title would be bad. The question

(1) 27 Beav. 204, 206.
(2) 3 My. & K. 495.
(3) 12 Ch. D. 273.
(4) 2 Taunt. 109.

whether the purchaser's title would be bad if there were not in fact any debts, supposing the time which has elapsed not to be too long, is determined by *Stroughill* v. *Anstey* (1), which is an authority for saying that if there is a charge of debts upon the property, then, if the purchaser has no knowledge that there are no debts, he has, except under peculiar circumstances, a right to assume that there are debts, and that his title is good whether there are or are not debts in fact. So far, therefore, from its being prudent in him to ask this question it is imprudent to ask it, unless there has been sufficient lapse of time to call upon him to make that requisition.

That raises the final point, whether in this case there had elapsed a sufficient time to put the purchaser on inquiry. It seems to me that it is only after a considerable time that he is bound to ask, and the question is what time is sufficient? Unless there be some particular circumstances in the case it seems to me that, as a general rule, the question should not be asked within twenty years, but that after twenty years it will be right to ask the question. Therefore, it seems to me that in the present case there was no occasion for the purchaser to ask the question. It was therefore an immaterial question which the vendors were not bound to answer.

Therefore, I am of opinion that there is not that kind of doubt in this title which would justify the Court in saying that it cannot be forced upon a purchaser, and the order ought to be that this purchaser is bound to complete.

HOLKER, L.J.:—

I am of the same opinion.

Marten, Q.C., asked that the order might be made without costs, the will being obscure. He referred to *Osborne* to *Rowlett* (2).

THE COURT ordered the purchaser to pay costs.

Solicitors for Purchaser: *Parish, Daintrey, & Hickson.*
Solicitors for Vendors: *Murray, Hutchins, & Stirling.*

(1) 1 D. M. & G. 635. (2) 13 Ch. D. 774.

H. C. J.

C. A.
1882
Feb. 15.

LYELL *v.* KENNEDY.

[1881 L. 30.]

Interrogatories—Action for Recovery of Land by Legal Title—Rules of Court, 1875, Ord. xxxi. r. 1—Production of Documents.

A Plaintiff who is seeking to recover possession of land by a legal title in what would before the *Judicature Act* have been an action of ejectment, cannot administer interrogatories for the examination of the Defendant, even though they relate solely to his own alleged title and not to the title of the Defendant.

A Plaintiff in such an action cannot obtain production of documents in the Defendant's possession, which the Defendant swears to relate solely to the defence of his own title.

THE statement of claim contained allegations the general effect of which was as follows. *Ann Duncan*, spinster, died intestate on the 5th of November, 1867, entitled in fee by purchase to certain real estate in *Manchester*, which she acquired in 1859. By indenture dated the 24th of December, 1880, the co-heiresses of *Ann Duncan* conveyed to the Plaintiff in fee their interest in the property, and assigned to him all rents and profits accrued since the death of *Ann Duncan*. *Ann Duncan*, who resided in *Scotland*, had requested the Defendant to manage the property on her behalf and act as her general agent, bailiff, and receiver. The Defendant accepted the management, and acted as her agent, bailiff, and receiver, and rendered regular accounts to her as such, and during her life was never in possession in any other capacity. At Miss *Duncan's* death and for long after, it was not known who was her heir-at-law. After Miss *Duncan's* death the Defendant continued to receive the rents, of which he kept regular accounts, and paid them into a bank, stating repeatedly, both verbally and in writing, to the Plaintiff and other persons that he was doing so on behalf of the heir-at-law, whoever he might be; and stating that he was ready to account to the heir-at-law when ascertained; and he stated by letter to the Plaintiff that the property would be delivered to the rightful owners as soon as it could be ascertained who they were. In 1879 certain parties,

claiming to be coheirs, brought an action for recovery of the property, and in 1880 were nonsuited. In four actions in 1880, the Defendant claimed to retain the property and rents for his own benefit, and set up the *Statute of Limitations*. The Plaintiff until shortly before the commencement of this action believed himself to be the heir-at-law.

The statement of claim further alleged that the Defendant was and always had been in possession of the property and in receipt of the rents and profits thereof accrued since the death of the intestate, and of certain vouchers, receipts, books, and writings, relating to the same as agent, bailiff, receiver, and trustee for the heir-at-law, and that the tenants had attorned to him in that capacity, but that he was wrongfully appropriating the rents and profits of the property to his own use. The Plaintiff claimed to have it declared that the Defendant was a trustee of the property for *Ann Duncan*, her heirs and assigns, and that the Plaintiff was now entitled thereto; and that the Defendant might be ordered to give to the Plaintiff possession of the property; and that if the legal estate in the property or any part of it was vested in the Defendant, he might be ordered to convey it to the Plaintiff; and for a receiver and an account of rents received by the Defendant.

The Plaintiff delivered interrogatories for the examination of the Defendant, which to a great extent were directed to obtaining information in support of the pedigree of the coheiresses through whom the Plaintiff claimed. The Defendant answered some of the interrogatories, and Vice-Chancellor *Bacon* refused to order him to make any further answer.

The Plaintiff appealed.

M'Clymont, for the Appellant:—

Order XIX., r. 15, excuses a defendant in ejectment from pleading his title, but that is no reason why interrogatories which relate to the plaintiff's title should not be answered.

[JESSEL, M.R.:—This is, in fact, an action of ejectment and for mesne profits alleging a special ground for excluding the operation of the *Statute of Limitations*. How can you interrogate the Defendant?]

C. A. 1882

LYELL v. KENNEDY.

I submit that the Plaintiff can interrogate: *Flintcroft* v. *Fletcher* (1).

[JESSEL, M.R., referred to *Horton* v. *Bott* (2).]

I do not contend that I can ask the Defendant anything about his title, but I may ask him questions to bring out evidence to support my own: *Harland* v. *Emerson* (3).

[JESSEL, M.R.:—That was a case where the Plaintiff claimed by an equitable title. Have you any case in which a bill for discovery in aid of an action of ejectment has been sustained?]

Selby v. *Selby* (4) is such a case.

[JESSEL, M.R.:—That was a bill against the claimant who was bringing ejectment.]

Stainton v. *Chadwick* (5).

[JESSEL, M.R:—That was not a bill for discovery, but to establish an equitable title.]

In *Rumbold* v. *Forteath* (6) the title was legal, yet discovery was given. The practice as to interrogatories is governed by Order XXXI., r. 1.

[BRETT, L.J.:—Do you say that this rule makes the scope of inquiry wider than before the Act?]

I cannot contend that it does.

[BRETT, L.J.:—Then you have to make out that before the Judicature Acts a Plaintiff in ejectment could interrogate the Defendant.]

The cases are in favour of that view: *New British Mutual Investment Company* v. *Peed* (7); *Towne* v. *Cocks* (8); *Adams* v. *Lloyd* (9); *Kettlewell* v. *Barstow* (10); *Attorney-General* v. *Corporation of London* (11); *Chester* v. *Wortley* (12).

[JESSEL, M.R.:—That was a case between landlord and tenant.]

(1) 11 Ex. 543.
(2) 2 H. & N. 249.
(3) 8 Bli. 62.
(4) 4 Bro. C. C. 11.
(5) 3 Mac. & G. 575.
(6) 3 K. & J. 748.
(7) 3 C. P. D. 196.
(8) Law Rep. 9 Ex. 45.
(9) 3 H. & N. 351.
(10) Law Rep. 7 Ch. 686.
(11) 2 Mac. & G. 247.
(12) 17 C. B. 410.

Horton Smith, Q.C., and *Clare, contrà*, were not called upon.

JESSEL, M.R.:—

This is an action by the assignee of alleged co-heiresses-at-law against the Defendant, who, as I read the statement of claim, is in possession of certain real property, to recover possession, and for mesne profits. It seems to me to be plain on the statement of claim that the Plaintiff is out of possession, that the Defendant is in possession, and that the title alleged by the Plaintiff is a legal title. If that is so, it is an action for the recovery of land by legal title, and is in all respects like what an action of ejectment and for mesne profits was before the *Judicature Act*. The only suggestion which has been made to take it out of that description is this: There is an allegation that the Defendant was a collector of rents for one *Ann Duncan*; that he, after her death, continued to receive the rents for the heir-at-law, whoever he might be, not knowing who he was, and there is a suggestion that that made him a sort of trustee, and there is a further allegation that the co-heiresses-at-law were found some time ago, and that in 1880 they conveyed and assigned the land and rents to the Plaintiff. Then it is argued that this representation by the Defendant, which was not made to the co-heiresses, would amount to a contract to pay the rents to them, and that, therefore, the action might be maintained on the ground of contract. It does not appear to me that that is possible. No contract is alleged either with the Plaintiff or with the co-heiresses-at-law, and the contract, if any, must have been made with *Ann Duncan* or with her executors. Then it is said that a representation of this kind made to a third person can be adopted by the person in whose favour the representation is made, and that, if adopted, it is equivalent to an original contract. I need not discuss that point, because there is no allegation of adoption by the co-heiresses, the only allegation is that the rents were assigned to the Plaintiff. The allegation of such an assignment cannot be treated as an allegation of an adoption by the representatives.

That being so, this is simply an action to recover land and mesne profits by a legal title, and then the question comes to this, could there have been a bill of discovery filed in aid of such an

C. A. 1882 LYELL v. KENNEDY. Jessel, M.R.

action if it had been brought before the *Judicature Act*? The answer to that is to be found in the judgment of the Court of Exchequer in the case of *Horton* v. *Bott* (1). On p. 256 Baron *Bramwell* says: "The case of an heir-at-law claiming against a person deriving title by conveyance from one of the claimant's ancestors, must have been of constant and continued occurrence year after year," [this is a case of a person deriving title by conveyance from the heirs-at-law,] "and the circumstance of no case existing in which such a discovery as that now sought for was obtained, is to our minds, strong to shew that there is not a right to it. If such a right existed, it would, in an infinite number of instances, have been of the utmost importance to heirs-at-law to have availed themselves of it. It is impossible not to see that such a right to discovery might have some most pernicious consequences. If it is to be established at all, it had better be in a Court of Equity familiar with these questions. As at present advised we think it does not exist, and consequently make this rule absolute." I entirely agree with those remarks. There is no such case, and the reason is, that it would be against public policy to allow such discovery. It is easy to say that only questions relating to the Plaintiff's title must be asked, but they might be so framed that the answers might most prejudicially affect the Defendant's title. Questions as to pedigree might be so framed that the answers would invalidate the Defendant's pedigree, or affect his title in some other way, and those answers might be taken advantage of by a new Plaintiff in a new action. The rule was that a man must recover in an action of ejectment by the strength of his own title alone, and I think there was a good reason for it, but, reason or no reason, the course of practice in these actions is conclusive as to the non-existence of the right of a Plaintiff in an action of ejectment to file a bill for discovery in aid of his action.

The next question is whether the Legislature has interfered subsequently and given a right to interrogate. This, so far as regards the *Common Law Procedure Act*, was disposed of in the case of *Horton* v. *Bott*. There the Court decided that the new procedure was a mere substitute for the old procedure in equity,

(1) 2 H. & N. 249.

and that if the right did not exist in equity before the passing of that Act, it did not exist at all, or, in other words, that the right to administer interrogatories stood exactly on the same footing as the right to file a bill of discovery.

We have now to proceed under the *Judicature Act*, which makes no distinction between equitable and legal actions. Still, this being an action for the recovery of land by a legal right, is exactly the old action of ejectment in substance though not in form. The Judicature Acts make an alteration of procedure merely, and not an alteration of the law, and if there was no right to file a bill of discovery or to administer interrogatories before the passing of the Judicature Acts, there is no such right now. For these reasons it appears to me that the decision of the learned Judge in the Court below was right, and that this appeal must be dismissed.

BRETT, L.J.:—

The first question in this case is, what is the nature of the action? At one time in the course of his argument Mr. *M'Clymont* seemed to admit that it was an action for the recovery of possession of land, which the Defendant was alleged to be holding adversely and improperly as against the Plaintiff, but he afterwards, under the stress of the argument, desired to contend that it was, at all events partially, an action founded on contract. In my opinion it is clear that this action is an action for the recovery of possession of land, and is not an action founded in any degree on contract. The statement of claim alleges that the Defendant is in possession of the land, and it states the legal title of the Plaintiff, and upon the ground of that legal title it prays that possession of the premises may be given to the Plaintiff. It is true that the statement of claim contains an allegation that the Defendant had undertaken with Miss *Duncan* to collect the rents for her. Now that was a contract with her, not with her heirs-at-law, and even if it could be made out to be a contract to collect the rents for the heir-at-law after her death, that would be a contract with her and her executors, it would not be a contract with the heir-at-law, or with any one representing him, and it is not therefore a contract which could be ratified by her heir-at-law. The truth, however, is that the allegation of contract with Miss

C. A. 1882 LYELL v. KENNEDY. Brett, L.J.

Duncan is not put in for the purpose of founding the action upon contract, but for the purpose of avoiding the effect of the *Statute of Limitations*. Therefore this action seems to me to be clearly an action brought to recover possession of land, and the right to recovery is rested upon the legal title of the Plaintiff. The question then is, whether in such an action the Plaintiff can interrogate the Defendant upon the matters affecting the Plaintiff's title, or I will put it as high as this, whether he can interrogate the Defendant at all. Before the *Common Law Procedure Act* was passed, anything in the nature of interrogatories could only have been propounded in a Court of Equity, and Mr. *M'Clymont* was asked whether he had any authority for saying that Courts of Equity had ever allowed a bill of discovery in aid of the case of a plaintiff who had brought an action of ejectment, and he could not produce any such authority. It seems to me that the reason why that is so is obvious. It was a right of property in *England* that where a man is in possession of real estate a person seeking to dispossess him by means of a legal title cannot do so except, as it has been said, on the strength of his own title. That is to say, the Plaintiff must shew that he himself has the legal title to the possession of the property, and must shew it entirely by his own means, the Defendant not being called upon to answer anything or to disclose anything. This was a right of property which ought not to be interfered with by any course of procedure, and Courts of Equity therefore declined to give the Plaintiff in ejectment any assistance in the way of discovery. When the *Common Law Procedure Act* was passed it was thought for a time that it gave a right to the Courts of Law to allow the Plaintiff in an action of ejectment to interrogate the Defendant. But it was clearly shewn by Baron *Bramwell*, in the judgment which has been referred to by the Master of the Rolls, that the *Common Law Procedure Act* was only an enactment as to procedure, and was not intended to affect rights, and that therefore there being such a right of property as I have mentioned, and there being nothing in the procedure of the Courts of Equity which derogated from that right, the *Common Law Procedure Act* which, so far as regards discovery, was only intended to give to the Common Law Courts the same powers as had existed in Courts of Equity, did not give them any power which Courts of Equity had not. Therefore neither before the

Common Law Procedure Act nor afterwards was a plaintiff in ejectment allowed to interrogate a defendant for the purpose of supporting the plaintiff's claim. Mr. *M'Clymont* argued that the *Judicature Act* had made an alteration in this respect. Now, as I have often had to say, that Act is only a statute as to procedure, and was not intended to alter the rights of parties. All that the *Judicature Act* has done is to say that in whatever Division of the High Court the action may be brought that Division shall exercise the same procedure so far as possible as the other Divisions. The statute regulates procedure, and it does not alter rights. Therefore Order XXXI. does not give anybody a right to interrogate which was never before exercised in any of the Courts either at Equity or at Law, it only regulates the way in which interrogatories which might have been administered before are to be administered, that is to say, the period within which, the mode in which, and the time at which they are to be administered. It gives no further right. If, therefore, neither by the *Common Law Procedure Act* nor by the Rules in Equity could a plaintiff in an action of ejectment before the *Judicature Act* have obtained by means of interrogatories any discovery from the Defendant in order to support his own title, he cannot do so now. The Judges in framing the rules under the *Judicature Act* took particular pains, as is manifest from Order XIX., rule 15, to maintain the rights of persons in possession of land in this country to stand possessed of it until persons who claim to dispossess them prove their own title entirely by their own means. That is a question of high policy with regard to the possession of property in *England*, from which it never was intended that the *Judicature Act* should in any way derogate. I am of opinion, therefore, not only that these answers were sufficient, but that, if the objection had been taken, every one of these interrogatories ought to have been disallowed from the beginning.

HOLKER, L.J.:—

I am of the same opinion.

The Defendant had filed the usual affidavit as to documents,

C. A. 1882 LYELL v. KENNEDY.

admitting the possession of certain documents relating to the matters in question in the action, but deposed that they related solely to the defence of his own title. The Plaintiff applied for production, and the application was refused by Vice-Chancellor *Bacon*. The Plaintiff appealed.

M'Clymont, for the appeal, referred to *Wright* v. *Vernon* (1).

Horton Smith, Q.C., and *Clare, contrà*, were not called upon.

JESSEL, M.R. :—

It appears to me that the affidavit is sufficient. The utmost that the Defendant could be asked to produce would be the deeds or documents relating to the Plaintiff's title. The Defendant swears that these documents relate solely to the defence of his own title. It appears to me therefore that, quite apart from the rule as to discovery in an action of ejectment, the Plaintiff cannot be entitled to what he asks here.

BRETT, L.J. :—

I think that in actions of ejectment we ought to be very careful with regard to enforcing production of documents. I do not say that the same rule applies to discovery of documents as to administering interrogatories. I do not say that in no case can a Plaintiff in an action of ejectment ask for discovery of documents. If he alleged that the Defendant had possession of his title-deeds or of documents which supported his title, and it was not denied by the Defendant that they supported the Plaintiff's title, the Defendant ought to be compelled to produce them. If, however, the Defendant answers on oath that the documents which are mentioned are documents which solely relate to his own title, I think that, in ejectment at all events, that is a sufficient answer. We have decided that it is part of the policy of the law that a Plaintiff in ejectment cannot administer interrogatories to the Defendant, and unless we were to watch somewhat strictly applications by a Plaintiff in ejectment for the inspection or production

(1) 1 Drew. 344.

of documents we should be letting him ferret out the Defendant's title by means of discovery from the Defendant, and I think that ought not to be encouraged.

C. A. 1882 LYELL v. KENNEDY.

HOLKER, L.J. :—

I entirely agree.

Solicitor for Plaintiff: *J. Balfour Allan.*
Solicitors for Defendant: *Rooke & Sons.*

H. C. J.

JARMAIN *v.* CHATTERTON.

C. A. 1882 V.-C. B. *Jan.* 20. C. A. *Feb.* 15, 17.

[1881 J. 2099.]

Refusal to commit for Contempt—Discretion of Judge—Right to appeal.

Where a Judge has refused to commit for contempt, an appeal lies from such refusal, although where that refusal has been simply an exercise of judicial discretion, the Court of Appeal, while entertaining an appeal, will be slow to alter the decision of the Court below.

Ashworth v. *Outram* (1) must not be treated as laying down a general rule that no appeal lies from a refusal to commit.

THIS was an appeal by the Plaintiffs from a refusal by Vice-Chancellor *Bacon* to commit the Defendant, *Chatterton*, and his treasurer, *H. Jennings*, to prison for contempt of Court.

The Plaintiffs in this action had lent the Defendant, *F. B. Chatterton*, various sums of money amounting to £257 10*s.* In consideration of this advance, *Chatterton*, by letter dated the 23rd of December, 1881, written to the Plaintiffs, authorized them to receive out of the receipts of the new *Sadlers Wells Theatre* the sum of £5 at every performance morning and evening, beginning with the 24th of December then instant, and he undertook not to withdraw this authority until the sum of £257 10*s.* should be repaid, and he authorized them to give notice of the letter to his treasurer.

On the same day he delivered to them a letter addressed to his then treasurer, *Jennings*, which was as follows: "Please to retain

(1) 5 Ch. D. 943.

C. A. 1882 JARMAIN v. CHATTERTON.

and hand to Messrs. *Jarmain & Trass* the sum of £5 out of the receipts of the theatre at every performance morning and evening from and including the 24th of December inst., until the sum of £257 10*s.* shall be duly paid to them." This authority was handed the same day to *Jennings*, who gave the Plaintiffs a receipt:—

"Dear Sirs,—I am in receipt of your notice of the 23rd of December, 1881, and at the request of Mr. *Chatterton* I hereby undertake to act upon it. "*H. B. Jennings.*"

Only one instalment having been paid to the Plaintiffs, the Plaintiffs on the 3rd of January, 1882, moved for a receiver to receive all moneys and takings at each and every of the performances at the theatre, and on the same day an order was made appointing a receiver of the rents and profits of the theatre under a memorandum dated the 29th of October, 1881, "and of £5 out of the gross receipts of each performance under the letter dated the 23rd of December, 1881." By a subsequent order of the 9th of January, *George Newman* was appointed such receiver.

On the 9th of January *Newman* presented himself at the theatre; *Jennings* refused to pay him, and on his attempting to dispossess the Defendant's money-collector and himself to take possession of the money taken in the boxes, he was turned forcibly out of the theatre.

The Plaintiffs accordingly, on the 20th of January, moved before Vice-Chancellor *Bacon* to commit both *Chatterton* and *Jennings* to prison for contempt in opposing and obstructing the receiver appointed to receive the £5, and preventing him from performing his duties as such receiver.

In answer to the motion, *Jennings* stated that the theatre had been unsuccessful: that all the actors had been playing at half salary; that on the evenings of the 7th and 9th of January he had been obliged to disburse the whole of the takings (which had been small) in part satisfaction of the wages of the employés and salaries of the actors, in order to enable the performance to proceed, and to prevent a riot in the theatre.

Since the 9th of January the theatre had been closed, the gas company having cut off the supply of gas in consequence of the

inability of the Defendant to pay their account for the week then past.

Hemming, Q.C., and *W. W. Cooper*, for the Plaintiffs.

Marten, Q.C., and *Terrell*, for *Chatterton* and *Jennings*.

BACON, V.C.:—

A more absurd application than this I have not heard. I am asked to order two men to go to gaol because the *Sadlers Wells Theatre* did not produce money enough to pay £5 to which the Plaintiffs say they are entitled, and to which perhaps they are not. There is an order that the Plaintiffs shall have £5 out of the takings of the theatre. That is the whole scope and effect of the order, and a man is appointed receiver to receive that sum when he can get it. He presents himself at the theatre, and supposes he has a right to be there, and demand payment of the £5; that he has a right to ransack the cheque boxes; that he has a right to take the accounts of the theatre and satisfy himself with what money has been received in the theatre. It was a total mistake on the part of the receiver to suppose that he had any such authority. He has a right to demand the payment of the £5, and if his demand is not complied with, he has a right to take any other proceedings in this Court which may be necessary, and the first object of such proceedings would be to ascertain whether there was £5 to pay him. What right does the order give him to go in with his companions and insist upon this, that, and the other? There is no pretence for it. What the meaning of the order is would have to be discussed if there was an application made to the Court to compel the payment of the £5. Mr. *Chatterton* would then be heard to say what his construction of the order was, and the Court would have to decide whether "receipts" means the net takings, or whether the £5 is to be paid out of the money that would be payable to these poor people who were acting in the theatre, and to the gas company, not a poor person, but, nevertheless, entitled to a demand.

There is no ground whatever for the application. It is redundant with an abundance of attorney's clerk's affidavits, the

C. A. 1882

JARMAIN v. CHATTERTON.

making of which is a waste of time and trouble. I refuse this application, and direct the Plaintiffs to pay the costs of it.

From this refusal the Plaintiffs appealed. The appeal came on for hearing on the 15th of February, 1882.

Hemming, Q.C., and *W. W. Cooper*, for the Appellants, after stating the facts, were stopped.

Marten, Q.C., and *Terrell*, for the Respondents:—

It is discretionary with the Judge whether he will or not commit for contempt, and there is no appeal against that discretion: *Ashworth* v. *Outram* (1).

Where the Court has held a person liable for contempt, there an appeal will lie: *Witt* v. *Corcoran* (2); and that is the distinction between the two classes of cases.

[JESSEL, M.R., referred to *In re Sir Robert Peel's School at Tamworth* (3); *Russell* v. *East Anglian Railway Company* (4).]

The former case raised an important question of jurisdiction which could only be decided in that way. Here no question of jurisdiction is raised. Then those cases were before the Judicature Acts, and the jurisdiction of the Court of Appeal has been altered by them. It has now been made a separate tribunal. Before those Acts the Vice-Chancellor sat for the Lord Chancellor, and an appeal lay to the Lord Chancellor.

The Plaintiffs have no such right as claimed. The order by referring to the letter must be taken to incorporate it, and that letter cannot be read so as to entitle the Plaintiffs to more than £5 out of the receipts after paying the expenses of management.

Hemming, in reply:—

The breach of the order in *Ashworth* v. *Outram* in all probability was of a very trifling kind, but there did not appear to be any dispute as to the meaning of the order. The Plaintiffs only desire an order similar to that made by Vice-Chancellor *Bacon* in *Parker* v. *Pocock* (5); *Seton* on Decrees (6).

(1) 5 Ch. D. 943.
(2) 2 Ch. D. 69.
(3) Law Rep. 3 Ch. 543.
(4) 3 Mac. & G. 104.
(5) 30 L. T. (N.S.) 458.
(6) Vol. i. p. 427.

JESSEL, M.R., after stating the facts, proceeded:—

The Plaintiffs moved to commit *Chatterton* and *Jennings* for contempt. It appears to me that the Defendants' action was a contempt. The order for a receiver includes an injunction. The Defendants had no right to retain or part with the money received in any way other than in paying it over to the extent of £5 to the Plaintiff. That being the position of matters, the Defendants were guilty of a breach of the order in spending this money in paying the actors.

But on the other hand, the receiver had no right to insist on dispossessing the Defendants' money collector: he had only a right to receive £5 out of the first receipts; he asked too much: the Defendants offered too little. It may be that the theatre will be opened again, and therefore the Plaintiff is entitled to come here and establish his right to receive £5 out of the gross receipts. The Defendants treat that as being net receipts, but gross receipts do not mean net receipts: net receipts would mean what will remain after paying the expenses of management; gross receipts mean the money actually collected.

The objection raised to the appeal is a serious one. It is said that by reason of the decision of *Ashworth* v. *Outram* (1) there can be no appeal against the order of the Vice-Chancellor refusing to commit. I have read the report of the case over and over again, and I confess I feel in some difficulty about it.

Considering the well-known practice of Courts of Equity, as illustrated by *Russell* v. *East Anglian Railway Company* (2) and Sir *Robert Peel's* case (3), that appeals are always allowed against such refusal, and considering that no change has been made in the practice, and also taking into consideration the fact that two of the Judges who decided *Ashworth* v. *Outram* were well acquainted with the practice of the Chancery Division, I think that they did not intend to alter the practice, and a different interpretation must be put upon that case.

Mr. *Terrell* fairly said that the old practice of the Court of Chancery was well known, but said that some alteration in it had been made by the *Judicature Act:* but that is not the case; there has been no such alteration.

(1) 5 Ch. D. 943. (2) 3 Mac. & G. 104. (3) Law Rep. 3 Ch. 543.

C. A. 1882 JARMAIN v. CHATTERTON. Jessel, M.R.

The case is shortly reported, and I never attempt to make minute distinctions between cases, but I think the case really meant this. There was there no question of right at all. It was admitted that the Defendant there had done wrong, but that she had done so under a misapprehension, and that the wrong was a very trifling wrong, and that the Court would not under those circumstances interfere with the discretion of the Judge below. If that is the meaning, Lord Justice *Baggallay's* observations are pertinent to that particular case only and not to the general law. If a question of right were involved they would not be so. It must be merely where the question is purely a matter of discretion. Lord Justice *James* said: (1) "The Vice-Chancellor did not think fit to make an order to commit, thinking that it was not necessary to commit for contempt in order to insure future obedience, and did not consider the case one for costs. Both points are matters of discretion, and you cannot appeal from such an order."

It is clear that Lord Justice *James* never intended to lay down a new rule, and thus his words must mean that in the circumstances of that case there was no appeal. It means this, that as a general rule the Court of Appeal will not entertain an appeal unless there has been a gross miscarriage.

The case of *Ashworth* v. *Outram* (2) is not in our way here, where a question of right is discussed, where the Defendants are asserting that under the order the Plaintiffs have no right to what they claim.

The Defendants must obey the order and restore the money, and they shall have a week for that purpose, if they do not pay the money then the order for committal will go. As regards the costs there is some difficulty; it may be said that both parties have been successful to a certain extent, and we therefore make no order as to costs here or below.

BRETT, L.J.:—

The first question is whether the Court will entertain an appeal in this case, and it is urged that wherever a Judge below has declined upon an application made to him to commit for con-

(1) 5 Ch. D. 944. (2) 5 Ch. D. 943.

tempt, the Court of Appeal will not entertain an appeal against his decision, and in support of that proposition the case of *Ashworth* v. *Outram* (1) is cited. The Court of Appeal in both its branches has often explained that even where the decision of the Judge below is simply an exercise of discretion the Court of Appeal has power to entertain and hear an appeal from it, is bound to a certain extent to hear it as the Court has said, yet when what has been done is a mere exercise of discretion the Court will not, unless in a very strong case, interfere, and in that sense it may be said that it will not entertain an appeal from discretion, that is, will not entertain the appeal for the purpose of altering the decision. Did the case of *Ashworth* v. *Outram*, in the cases of applications like this to commit for contempt, intend to lay down a general rule that the Court will not entertain such appeals, that is, for the purpose of altering the decision of the Court below? If that were the clear meaning of *Ashworth* v. *Outram* we could not differ from it. The parties who object to it would have to go to a higher tribunal. I apprehend that the case of *Russell* v. *East Anglian Railway Company* (2) and Sir *R. Peel's* case (3) shew that when an application is made to a Vice-Chancellor to commit, and he declines to commit in a case where there is a dispute whether the order said to be disobeyed had a particular meaning or not, and in consequence of the Vice-Chancellor giving it a peculiar construction, he came to the conclusion that there had been no contempt, and on an appeal from that decision the Court of Appeal came to a different conclusion upon the order, they would then exercise the power of enforcing the order and make the order which the Vice-Chancellor would have made if he had construed the order in the same way. If not, the result would follow that the Court of Appeal, while differing from the Judge below on the construction of the order, would not be able to do that which they thought was right to be done merely because the Vice-Chancellor had put a different construction on the order.

What *Ashworth* v. *Outram* really meant was, I think, this: In that case there was no dispute as to the meaning of the order —no dispute as to whether the order had been disobeyed or not—

(1) 5 Ch. D. 943. (2) 3 Mac. & G. 104. (3) Law Rep. 3 Ch. 543.

C. A. 1882 JARMAIN v. CHATTERTON. Brett, L.J.

but the Vice-Chancellor, on the circumstances of the case, came to the conclusion that he should exercise his discretion indulgently, that is, he merely made the costs of the motion costs in the cause, and further, there was no appeal as to the construction of the agreement; the appeal was confined to this: as to the mode of enforcing the order, and was simply from the discretion of the Judge; and the Court of Appeal said that when an appeal is simply on this ground, although the Court has jurisdiction on so delicate a matter, it will not exercise it.

That case is not one now to be questioned. Whether under the circumstances it was a reportable case is another question. We must, therefore, entertain the question, and see whether the Plaintiff should obtain his order for committal.

Here the meaning of the order is in dispute, and a considerable question is raised whether the Vice-Chancellor did not interpret the order in a different way from that in which this Court has construed it.

His Lordship then reviewed the facts, and upon them came to the same conclusion as the Master of the Rolls.

HOLKER, L.J.:—

This case has raised a question of importance—that is, whether an appeal can be brought against the refusal of the Vice-Chancellor to commit a person who has been alleged to be guilty of contempt. It is said that it has been established that when a Judge in the exercise of his discretion has refused to commit there can be no appeal, and the case of *Ashworth* v. *Outram* (1) is cited as an authority in support of that proposition. Now, certainly it strikes everybody conversant with law that there must be something exceptional about that case, some facts in it not clearly expressed, or some view of the Judges who decided it not explicitly set forth. I cannot think that the Judges who decided *Ashworth* v. *Outram* intended to overrule the old cases in Chancery, and certainly not without saying a single word about them. It is impossible to conceive that Judges could intend to alter the whole course of practice which had prevailed up to that time

(1) 5 Ch. D. 943.

C. A. 1882 JARMAIN v. CHATTERTON. Holker, L.J.

without any further reason than that suggested by Mr. *Terrell* in his able argument, that the rule may have been altered by the Legislature in some provision of the *Judicature Act*. I cannot believe that the Judges who decided that case, if they had thought that the old rule had been altered or abrogated by the Legislature, would not have said so; but there is not a single word in any of their judgments to that effect.

In all probability the explanation given by Lord Justice *Brett* is the correct one, and if so, it is not necessary for this Court to adopt the conclusion, which one would derive from the decision if taken literally, that there can be no appeal from the decision of a Judge refusing to commit.

Upon the facts his Lordship agreed with the other members of the Court.

Solicitors for Appellants: *Scott, Jarmain, & Trass.*
Solicitor for Respondents: *Van Tromp.*

M. W.

QUARTZ HILL CONSOLIDATED GOLD MINING COMPANY *v.* BEALL.

C. A. 1882 *Feb.* 25.

[1882 Q. 7.]

Injunction—Libel—Interlocutory Application—Privileged Communication—Common Law Procedure Act, 1854 (17 & 18 *Vict. c.* 125), *ss.* 79, 82 [*Revised Ed. Statutes, vol. xii. p.* 422]—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 8.

A solicitor, acting for some shareholders in a company, printed and circulated, but only among the shareholders, a circular containing very strong reflections on the mode in which the company had been brought out, and on the conduct of the promoters and directors, and proposing a meeting of shareholders to take steps to protect their interests. The company commenced an action to restrain the further publication, and applied for an interlocutory injunction, which was granted by Vice-Chancellor *Bacon*:—

Held, on appeal that the Court has jurisdiction to interfere on interlocutory application to restrain the publication of a libel.

But *held*, that this jurisdiction is to be exercised with great caution, and will not in general be exercised unless the applicant satisfies the Court that the statements in the document complained of are untrue.

Held, further, that still more caution is requisite where the document in

C. A.

1882

QUARTZ HILL CONSOLIDATED GOLD MINING COMPANY v. BEALL.

question is *primâ facie* a privileged communication, so as not to be actionable unless express malice is proved, the question of malice being one which cannot conveniently be tried on interlocutory application.

In the present case the Court not being satisfied on the evidence that the statements in the document were false or malicious, the order for an injunction was discharged.

THIS was an action by the *Quartz Hill Consolidated Gold Mining Company* to restrain *Edward Beall*, carrying on business as a solicitor under the firm of "*Beall & Co.*," from publishing or issuing a certain circular, or any circular or notice or advertisement to the same purport or effect, and to recover damages for the publication.

The statement of claim alleged that *Beall* had been acting as solicitor for *Tucker*, a holder of 100 shares in the company, in the matter of an application to rectify the register of shareholders by removing the name of *Tucker* therefrom, and that he was not concerned for any other shareholder. That *Beall* wilfully and maliciously, intending to injure and damage the company, published and circulated a libel in the form of a printed circular addressed to the shareholders, which was as follows:—

"*The Quartz Hill Consolidated Gold Mining Company, Limited.*

"To the shareholders:—

"Alarmed by the rumours and revelations as to the manner in which this company was brought out, and particularly the large sum made by the promoters at the expense and sacrifice of other interests, we were, in September last, instructed by several shareholders to make searching inquiries as to the various matters complained of, and if satisfied that there were just grounds for taking remedial action, to institute such proceedings for relief as counsel might advise.

"It will be remembered that it was stated in the prospectus that upwards of 35,000 shares, exclusive of the vendor's, had already been applied for. After careful and diligent inquiry we have not been able to verify this unreserved statement, and we believe that no such number of *bonâ fide* applications were ever made. This fact alone was, in the opinion of counsel, sufficient to entitle those who subscribed on the faith of the prospectus to a return of their money, and the removal of their names from the register of

members. Moreover as it appeared that there was no probability of the company succeeding, as the mine was represented to be worthless and exhausted by old and abandoned operations, we took the necessary steps to achieve the object desired. Our clients, although hitherto working in their own interest, feel that their proceedings must, in their direct result, largely benefit their fellow shareholders; they are therefore desirous of inviting their co-operation, with the object of securing speedy relief under more satisfactory conditions than working alone and comparatively single-handed. They are satisfied that any money (if any remains) expended on this property will be utterly thrown away and lost, while those who first take action will recover their money in full, leaving a diminished margin for the residuary shareholders, whose claims to share in any distribution rank equally with their own. With the view of protecting interests which are common and identical, we have received instructions to communicate with the entire body of *bonâ fide* shareholders, and ascertain their wishes, more particularly upon the following points, viz.:—1. The return of their subscribed capital. 2. The removal of their names from the register of members, and consequent exemption from the payment of any further calls. 3. That the company should go on, and that the statements as to the *bona fides* of the company should be unchallenged. 4. In the event of the course indicated in proposition No. 3 being adopted, whether the present directors should not be requested to resign, and their places supplied by shareholders having a legitimate interest and stake in the company?

"Our clients have no desire to do anything contrary to the general wish of their fellow shareholders or prejudicial to their interests, but without abandoning the remedies open to and available by them they invite discussion on the above suggestions, and solicit your approval or disapproval. In the event of your co-operating with our clients, we shall be glad to know that you are also prepared to share the expenses incidental thereto, such contribution not to exceed 2*s.* per share.

"It is proposed to convene a meeting at an early date of such shareholders as thus desire to be confederated for self-protection, when detailed information, which at this moment it would not be expedient to publish and circulate, will be furnished, justifying

C. A. 1882

QUARTZ HILL CONSOLIDATED GOLD MINING COMPANY v. BEALL.

the allegations made in the *Mining Journal* as recently as the 7th inst. :—'*That this property, originally called the Kansas Mine, abandoned and sold for a song, was brought out and christened the* QUARTZ HILL, *and sold to the company for* £40,000, *and a nominal capital of* £200,000 *raised, and that the concern was not worth a cent twelve years ago, and now.*' This extract under-estimates the purchase consideration, which in cash and shares amounted to no less than £150,000.

"We cannot withhold an expression of surprise that the directors should maintain an ominous silence, while such statements are permitted to go uncontradicted.

"Your early return of the enclosed queries with your observations thereon will be appreciated, and disclaiming on the part of those who instruct us any personal motive beyond their direct interest as fellow shareholders with yourselves, in a project palmed off upon them under circumstances which they now believe to have been misleading if not fraudulent,

"We remain,

"Yours faithfully,

"*Beall & Co.*"

"To be returned to Messrs. *Beall & Co.*

"I the undersigned, holding shares in the *Quartz Hill Consolidated Gold Mining Company, Limited*, approve of the following propositions against which I have written Yes; and disapprove of those against which I have written No.

"1. To have my money returned.

"2. To have my name removed from the register of members, and relieved from all liability from further calls.

"3. To contribute 2*s.* per share in accordance with the terms of the letter of Messrs. *Beall & Co.*

"4. To allow the company to go on.

"5. To elect, in the place of the present directors, independent shareholders having a legitimate interest and stake in the company.

"6. State whether subscribed for shares on the faith of the statements in the prospectus.

"Name,

"Address,

"Date."

The statement of claim went on to allege that the whole of the statements, representations, insinuations, and suggestions contained in the circular as to the circumstances relating to the formation of the company, as to the mines and mining premises of the company and the extent to which they had been worked before the company acquired them, as to the financial position and prospects of the company, as to any project having been palmed off on the company or the shareholders under misleading and fraudulent circumstances, and as to any improper conduct on the part of the directors or other officers of the company were untrue in substance and in fact, and were known by *Beall* to be untrue. After various other allegations the statement of claim went on to allege that the circular was by, or by the direction of *Beall* and the persons in league and associated with him, for the purpose of sending down the market and selling value of the shares in the company and of damaging, and if possible ruining, the company, very widely published and distributed by post and otherwise to and amongst not merely persons who were shareholders in the company but also persons who might become such shareholders and also the general public, and in consequence thereof both the shares of the company were greatly depreciated in value, and extreme damage was caused to the company, and it was rendered almost impossible for the company to continue to carry on its business.

The company moved for an injunction, the application being supported only by an affidavit of the secretary of the company. As regards the truth of the statements of the circular he merely said: "The statements made in the said circular as to the number of shares applied for in the Plaintiff company and as to the value of the mine and property acquired by the Plaintiff company as aforesaid, are to the best of my knowledge, information, and belief utterly untrue." The Defendant deposed to his belief that all the statements in the circular were true. There was no evidence of the circular having been issued to any but shareholders.

Vice-Chancellor *Bacon*, on the 27th of January, 1882, granted an interlocutory injunction restraining the Defendant until judgment or further order from publishing or issuing the circular, or any circular notice or advertisement to the same purport or effect,

C. A. 1882

QUARTZ HILL CONSOLIDATED GOLD MINING COMPANY v. BEALL.

or which contained statements or representations to the same purport or effect, or otherwise libellous or defamatory to the company or the property, title to property, value of assets, or financial position of the company.

Higgins, Q.C., and *Beddall*, for the appeal:—

We contend that there is no jurisdiction to grant an interlocutory injunction.

[JESSEL, M.R., referred to *Beddow* v. *Beddow* (1).]

That case does not shew that the Court can grant an injunction in a case like this, unless it could have been granted at common law under the *Common Law Procedure Act*, 1854. Now, under sect. 79 of that Act, the injunction could only have been granted at the trial.

[JESSEL, M.R.:—I am not prepared to agree to that.

BAGGALLAY, L.J., referred to *Thomas* v. *Williams* (2) and *Thorley's Cattle Food Company* v. *Massam* (3).]

Hinrichs v. *Berndes* (4) is against granting the injunction before the trial.

[JESSEL, M.R.:—You had better go to the merits. There is no doubt about the jurisdiction.]

The circular is a privileged communication to the shareholders about their own affairs.

[JESSEL, M.R.:—Was it sent to any one but shareholders?]

No.

[They were then stopped by the Court.]

Marten, Q.C., and *Seward Brice*, for the company:—

Privilege exists only where a communication is made *bonâ fide*, but this is not *bonâ fide*. This circular is part of a scheme to discredit the company, the statements in it are so inconsistent that some of them must be untrue, and in one particular it is clearly untrue. The extract contained in it is not an extract from the *Mining Journal* itself, but from an anonymous letter sent to that

(1) 9 Ch. D. 89.
(2) 14 Ch. D. 864.
(3) 14 Ch. D. 763.
(4) Weekly Notes, 1878, p. 11.

journal. The circular is an attempt to interfere with the pending proceedings to remove *Tucker* from the register.

C. A. 1882

QUARTZ HILL CONSOLIDATED GOLD MINING COMPANY v. BEALL.

[JESSEL, M.R.:—That is a matter for an application in those proceedings. I do not see in your statement of claim any allegations that the Defendant is going to continue issuing these circulars.]

In the Court below he insisted on his right to issue them.

[JESSEL, M.R.:—You must rely on what you allege and prove.]

JESSEL, M.R.:—

This is an appeal from a decision of Vice-Chancellor *Bacon* granting an injunction upon interlocutory application to restrain the publication of a libel. I have no doubt whatever that there is jurisdiction to grant such an injunction. It is plain that the jurisdiction conferred on the Common Law Courts by the *Common Law Procedure Act* of 1854 extended to the granting of such an injunction. The 79th section is as large in terms as can well be, and the 82nd section allows *ex parte* injunctions in every case where a final injunction could be granted under the 79th section. Of course, under the rule of *omne majus continet in se minus*, if the Court can grant an injunction *ex parte*, *à fortiori* it can grant it on notice. It is, therefore, clear to my mind that the Common Law Courts had this jurisdiction in all Common Law actions. That jurisdiction is transferred to the High Court, and that would suffice to decide this question of jurisdiction. But by the *Judicature Act* of 1873, s. 25, subs. 8, a larger jurisdiction to grant injunctions than existed before is given in every case; and in my opinion that enactment extends the general jurisdiction given in Common Law actions to all actions whether in Equity or at Common Law. The result, therefore, is that there is jurisdiction in a proper case upon interlocutory application to restrain the further publication of a libel. What I have said is confirmed by *Beddow* v. *Beddow* (1), *Shaw* v. *Earl of Jersey* (2), and *Day* v. *Brownrigg* (3). But the question as to whether the jurisdiction though existing has been properly exercised is quite different.

(1) 9 Ch. D. 89.

(2) 4 C. P. D. 120, 359.

(3) 10 Ch. D. 294.

C. A. 1882

QUARTZ HILL CONSOLIDATED GOLD MINING COMPANY v. BEALL.

Jessel, M.R.

It is a jurisdiction which must be very carefully exercised. No doubt there are cases in which it would be quite proper to exercise it, as, for instance, the case of an atrocious libel wholly unjustified and inflicting the most serious injury on the Plaintiff. But, on the other hand, where there is a case to try, and no immediate injury to be expected from the further publication of the libel, it would be very dangerous to restrain it by interlocutory injunction.

In the present case, I think that the objections to the exercise of the jurisdiction are, at least, three. In the first place, the alleged libel is not proved to be untrue. Now, for a Plaintiff to come to a Court and say, "Prevent the publication of something which I do not prove to be untrue," is a very strong thing indeed. No doubt it has been said in some cases that the greater the truth the greater the libel; but that does not apply to interlocutory injunctions. As a general rule the Plaintiff who applies for an interlocutory injunction must shew the statement to be untrue. Now, in this instance, the only witness for the Plaintiffs is their secretary, who says not that the circular is untrue, but that the statements in the circular are to the best of his knowledge, information, and belief utterly untrue. He does not shew that he has any knowledge at all on the subject of these statements. He probably as secretary has some knowledge about them, but he does not shew it; and where an affidavit is made upon information and belief the rules of the Court require that the deponent should state what are the grounds of his information and belief, and that he does not do, he only says that they are untrue to the best of his knowledge, information, and belief, not saying what the best of his knowledge is, and it may be nothing at all. There is, therefore, no evidence as to the untruth of the allegations in the circular. And, on the other hand, the Defendant has pledged his oath that he verily believes they are true. In this state of the evidence I am of opinion that no injunction ought to have been granted.

The next point is this. The injunction is to restrain future publication. Now the circular in question has been issued to all the shareholders; there is no allegation either on the writ or the statement of claim, or the affidavit of any intention on the part of

the Defendant to issue any more circulars, nor can I infer such intention, because it is alleged that he has issued the circular to all the shareholders. There is no ground, therefore, for interference. The act is past, the mischief has been done, if mischief there is, and there is no ground for the intervention of the Court before the trial. It appears to me this also is a fatal objection to the motion.

The third ground is this, and a most important ground it is. The circular appears on the face of it to be in the nature of a privileged communication. It is issued by one shareholder to his brother shareholders, asking for their co-operation either in putting an end to the company or reconstituting it. As I said before, it may be answered that it is malicious and not entitled to protection, but that is very difficult to try upon interlocutory application. In the present case the Defendant says he is acting *bonâ fide*, and there is no evidence against him. But if there were, I think a Judge should hesitate long before he decides so difficult a question as that of privilege upon an interlocutory application, the circular being on the face of it privileged, and the only answer being express malice. Those are questions which really cannot be tried upon affidavit, or in the mode in which an interlocutory application is disposed of. In the present instance I can see no sufficient reasons for taking the circular out of the protection of privilege, and that is the third reason why I think this motion ought not to have succeeded. The result is that, in my opinion, we ought to discharge the order of the Vice-Chancellor, and direct the motion to be refused, with costs here and below.

BAGGALLAY, L.J.:—

In the opening of this appeal the counsel for the Appellant raised the question as to the jurisdiction of the Court to grant an interlocutory injunction to restrain the publication of a libel. From the time when the *Common Law Procedure Act*, 1854, became law until the passing of the Judicature Acts, the Courts of Common Law had a more extensive jurisdiction as regards the granting of injunctions than the Court of Chancery. The cases in which the Court of Chancery could grant injunctions were of

C. A. 1882

QUARTZ HILL CONSOLIDATED GOLD MINING COMPANY v. BEALL.

Baggallay, L.J.

certain limited though well ascertained classes, but the language of the *Common Law Procedure Act* authorized the granting of an injunction in all cases of breach of contract or other injury where the party injured is entitled to maintain and has brought an action. That was the 79th section, and the 82nd section went on to provide that that injunction might be applied for *ex parte* at any time after the commencement of the action. Then came the *Judicature Act*, which conferred on the High Court all the powers and authorities possessed by the Courts of Common Law, as well as those possessed by the Court of Chancery previously to the passing of that Act. The High Court, therefore, now has the full and extensive power which Courts of Common Law had before the *Judicature Act*. It is quite true that that power was very seldom exercised in the shape of granting an interlocutory injunction, but at the same time the power existed, and might have been exercised if the Court had thought fit in cases brought under its consideration. This power has been exercised since the passing of the *Judicature Act* in a variety of cases, among which are *Beddow* v. *Beddow* (1) and *Thomas* v. *Williams* (2), and I entirely assent to the view taken by the learned Judges who decided those cases. Had this been the case of an injunction at the hearing, and not upon an interlocutory application, I should have been very much disposed to think that it was within the jurisdiction of the Court of Chancery under its old practice. The circular is one the allegations in which, if untrue, are calculated to injure the company in the course of their trade, and I am inclined to think, therefore, that it would come within that class of cases where the Court interfered at the hearing of the cause, but not on interlocutory application. The case of *Thorley's Cattle Food Company* v. *Massam* (3) illustrates the view I have expressed.

There being, then, jurisdiction to entertain the case, the next question is, whether the merits are such as to warrant the order. I am satisfied that they are not. I will not travel over the three several points which have been referred to by the Master of the Rolls in the course of his judgment. I entirely concur in each of the three reasons which have been assigned by him for holding

(1) 9 Ch. D. 89. (2) 14 Ch. D. 864.
(3) 14 Ch. D. 763.

that the injunction ought not to have been granted, and perhaps I may go further and say that it appears to me that upon a reasonable construction of the document in question I am unable to see on the face of it anything of a libellous character, nor is it made of a libellous character by reason of any evidence before us to which we can listen.

For these reasons I am of opinion that the order of the Vice-Chancellor must be discharged.

LINDLEY, L.J.:—

I am of the same opinion. I regret very much that we have not had the opportunity of perusing the judgment of the Vice-Chancellor *Bacon*, from which we differ; but no note has been taken of it, and we are somewhat in the dark as to the reasons which influenced him.

As to the question of jurisdiction, I am satisfied from the cases of *Thomas* v. *Williams* (1) and *Beddow* v. *Beddow* (2) that there is jurisdiction to grant injunctions to restrain libels, and it is very important that this should be known. I do not doubt that it is right, when the evidence and the facts warrant it, to exercise that jurisdiction even upon an interlocutory application, because prevention is better than cure, and an injunction to stop the publication of a libel is a great deal better than an action for damages in consequence of its publication.

But when a party comes to ask the Court to restrain the publication of a document as libellous which appears on the face of it to be a privileged communication, I think that the utmost possible caution is requisite before the Court interferes. I do not mean to say that if it was made plain even upon interlocutory application that a privileged communication was malicious, that is to say, if the plaintiff could prove (the burden of proof being on him in all such cases) that the Defendant had so far abused his privilege as to render the publication actionable, an injunction ought not to be granted; but the Court ought to be very careful before it restrains the issuing of that which is *primâ facie* a privileged communication. Now, if we bear in mind that the burden of proof is entirely on the Plaintiffs to shew that this is a malicious

(1) 14 Ch. D. 864. (2) 9 Ch. D. 89.

C. A. 1882 — QUARTZ HILL CONSOLIDATED GOLD MINING COMPANY v. BEALL.

libel, the occasion being privileged, the evidence is utterly worthless, and does not deserve consideration. It appears to me that on that ground, to say nothing of the other grounds which have been mentioned, this injunction ought not to have been granted.

Solicitors for Plaintiffs: *Snell, Son, & Greenip.*
Solicitors for Defendant: *Beall & Co.*

H. C. J.

C. A. 1882 — *Feb.* 25.

BIDDER *v.* McLEAN.

[1881 B. 6287.]

Pleading—General Demurrer—Rules of Court, 1875, *Order* XXVIII., *r.* 2.

The equity in a statement of claim was not apparent, but had to be collected from a long and complicated series of facts. A Defendant put in a general demurrer on the ground "that the facts alleged do not shew any cause of action to which effect can be given as against this Defendant:"—

Held (affirming the decision of *Kay*, J.), that, notwithstanding Order XXVIII., r. 2, a demurrer in this form was in such a case sufficient.

THIS was an action asking for a declaration that certain sums of railway stock were held upon a trust alleged in the statement of claim. The statement of claim was long, and it is impossible to give any useful abridgment of it; the equity, if any, having to be collected from a complicated state of facts. The first-named Defendant put in the following demurrer:—

"The Defendant, *F. McLean*, demurs to the Plaintiff's statement of claim, and says that the same is bad in law on the ground that the facts alleged therein do not shew any cause of action to which effect can be given by the Court as against the Defendant, *F. McLean*, and on other grounds sufficient in law to sustain this demurrer."

The Plaintiff took out a summons asking "that the demurrer delivered by the Defendant *F. McLean* may be set aside with costs, on the ground that it does not state specifically whether it is to the whole or to a part, and to what part, of the statement of claim, and that it does not state any ground in law for the

demurrer, and that no ground of demurrer or only a frivolous ground of demurrer is stated."

Mr. Justice *Kay* refused the application.

The Plaintiff appealed.

W. P. Beale, for the Appellant:—

The question is whether a general demurrer for want of equity, without stating any particular ground of demurrer, is sufficient. I submit that it is not. Order XXVIII., rule 2, requires some ground in law to be stated.

[JESSEL, M.R.:—What better ground in law can there be than that you have no equity?]

If a general demurrer on the ground that there is no equity is sufficient, it is impossible that there should be a frivolous ground as mentioned in the rule. Rule 1 provides that the only ground of demurrer to a claim shall be that the facts alleged in the claim do not shew any cause of action, and then the 2nd rule requires that a specific ground shall be alleged. If this demurrer is admitted a demurrer in every case may be general.

Borthwick, contrà, was not called upon.

JESSEL, M.R.:—

This is a case in which I must say that the Plaintiff had some reason to expect a general demurrer for want of equity. I do not mean to prejudge the question whether the demurrer will succeed, but the equity is not obvious at first sight. The Defendant puts in a general demurrer on the ground that the facts alleged in the statement of claim do not shew any cause of action to which effect can be given against the Defendant. I have not heard a suggestion in what better form the demurrer could have been put in such a case as the present. It is urged that if we hold this demurrer good in form the directions of Order XXVIII., rule 2, will be made nugatory, but that is not so. I do not think that it was intended to make it impossible to demur in a case where the statement of claim is so framed that the only way of meeting it is

C. A. 1882 BIDDER v. MCLEAN.

by the simple allegation that it shews no cause of action. In many cases a general demurrer like this would be improper, but I think that it is not so in the present case.

BAGGALLAY, L.J.:—

In my opinion a general demurrer may be sufficient under the order, and I think that it is so in the present case. I do not mean to say that it generally is so.

LINDLEY, L.J.:—

Each case must be determined with reference to the form of the statement of claim. I think that in this case a general demurrer is sufficient, though I do not say that it would be so generally.

Solicitors for Plaintiff: *Beale, Marigold, & Beale.*
Solicitors for demurring Defendant: *Hargrove & Co.*

H. C. J.

C. A. 1882 *March* 4.

In re H. D. RYDER (A LUNATIC).

Lunacy—Copyhold—Enfranchisement—Devolution of Enfranchised Estate.

The Court on sanctioning proceedings for carrying into effect the enfranchisement of a copyhold estate belonging to a lunatic, the rules of descent as to which were different from those as to the descent of freeholds, made a declaration that in the event of his dying intestate as to the enfranchised property, his heir-at-law would stand seised thereof in trust for the persons who would have been entitled thereto as his heirs according to the custom of the manor if it had not been enfranchised.

THE lunatic, *Henry Dudley Ryder*, was absolutely entitled to one undivided moiety of a copyhold estate at *Hackney*. By a report dated the 30th of June, 1881, and a fiat dated the 2nd of August, 1881, it was among other things directed that the committees of the estate of the lunatic should be at liberty to join with the co-owner in taking the necessary proceedings for obtaining the enfranchisement of the copyhold estate.

Copyholds in the manor of *Hackney* descend according to the custom of gavelkind, and by the report and fiat it was provided

"such enfranchisement to be without prejudice to the rights of succession to the said copyhold estate on the death of the said *H. D. Ryder*."

The enfranchisement was proceeding under the Copyhold Acts, and the committees were advised that the legal descent of the enfranchised estate would be according to the ordinary law of descent of freehold estates.

The Master in Lunacy had made a report approving of certain arrangements for carrying the enfranchisement into effect. The committees presented a petition to confirm the report and have its directions carried into effect, and prayed *inter alia* that it might be declared that in the event of the lunatic dying intestate as to this property, his heir-at-law would stand seised of so much thereof as should be of freehold tenure in trust for the persons who would have been his heirs according to the custom of the manor whereof the same were holden if the same had not been enfranchised.

John Pearson, Q.C., and *Cecil Russell*, for the Petitioner.

M. G. Davidson, for the Respondents, the co-heiresses presumptive according to the customs of the manor, two of whom were co-heiresses presumptive at law.

Jessel, M.R.:—

I am of opinion that a declaration such as is asked for ought to be made. The enfranchisement can only be made with the leave of the Court, and the Court in granting leave can impose such terms as are just. Now it is a settled principle in lunacy that the Court will not alter the rights of succession to the lunatic's property. A declaration will therefore be made which will on the death of the lunatic intestate carry the equitable interest in the enfranchised copyhold to the persons who would have taken it if it had not been enfranchised.

Lindley, L.J., concurred.

Solicitors: *Davidson, Burch, & Whitehead.*

H. C. J.

C. A. 1882 March 6.

In re HENRY SMITH'S CHARITY (HARTLEPOOL).

Charity—Alteration of Scheme—Renewable Leases—Charitable Trusts Act, 1853 (16 & 17 *Vict. c.* 137), *s.* 21 [*Revised Ed. Statutes, vol. xi. p.* 987].

A scheme, settled in 1856, for the administration of a charity, authorized the granting of building leases with the sanction of the Charity Commissioners for ninety-nine years absolute, or for twenty-one years with a covenant for perpetual renewal at the expiration of every twenty-one years, on payment of a fine of one-half the then annual value of the demised premises. The Attorney-General applied to have this scheme amended by striking out the clause as to granting leases:—

Held, by the Court of Appeal, affirming the decision of *Chitty*, J., that the clause ought to be struck out, leaving the granting of leases to be governed by the *Charitable Trusts Act*, 1853 (16 & 17 Vict. c. 137), s. 21.

HENRY SMITH'S CHARITY was originally founded in 1625, and a scheme for its administration was approved by the Court of Chancery in 1832. The lands belonging to the charity were situate near *Hartlepool*, and having become valuable for building purposes, a petition was presented for a scheme for letting them on building leases. On the 6th of May, 1846, the Master reported that the best mode of letting the lands would be on building leases, to be granted without fine for twenty-one years, and renewable with a fine of half-a-year's rental of the buildings erected on the land let. This report was confirmed by order of the 29th of May, 1846. In 1851 an information was filed for the administration of the charity, and by the decree on the 14th of February, 1853, an inquiry was directed whether any variation should take place in the matter of letting the charity lands.

The Master, by his report in 1855, found that it would be for the benefit of the charity that the scheme of letting approved in the report of May, 1846, should be put an end to, and that in future the trustees should have power, with the sanction of the Charity Commissioners, to grant building leases according to the provisions contained in the scheme annexed to his report.

The 18th clause of the scheme was as follows: "If at any time any part of the charity property shall be capable of improvement by the erection of new buildings thereon, and such new buildings would be a permanent benefit to the charity, the trustees

shall be at liberty to grant a lease or leases thereof for a term of ninety-nine years absolute, or for twenty-one years, with a covenant on the part of the trustees for perpetual renewal at the expiration of every twenty-one years, on payment to the trustees on each such renewal of a fine of one-half the then annual value of the demised premises, and subject to the payment of such rent and under such covenants and conditions as to the Charity Commissioners shall seem fit. Provided always, that in order to let the said lands in a manner most advantageous to the Charity, the trustees shall, before accepting any private offer, cause the letting to be put up to public tender, subject to such conditions as they may think necessary." By decree made in 1856 this scheme was carried into effect.

A considerable part of the property of the Charity was let for building on leases for twenty-one years, renewable as above. The remainder was unlet.

The Charity Commissioners, in 1880, made a certificate stating that before they proceeded to entertain applications for their sanction to further leases they called the attention of the Attorney-General to the circumstances of the case, with a view to bringing before the Chancery Division, if he should think fit to do so, the propriety of the continuance of the 18th clause of the scheme.

The Attorney-General accordingly applied by summons under the *Charitable Trusts Act* to have the scheme of 1855 amended by striking out the 18th clause. Mr. Justice *Chitty* made an order accordingly, thus leaving the letting to be governed by the *Charitable Trusts Act*, 1853 (16 & 17 Vict. c. 137), sect. 21. The trustees of the charity appealed.

The trustees adduced evidence that in *Hartlepool* lessees could not be found who would erect a good class of houses on a ninety-nine years' lease, that it was found by experience that a better class of houses were built on property let on the renewable leases for twenty-one years than on adjoining property let for terms of 200 years absolute, and that this mode of letting was a beneficial one.

Ince, Q.C., and *Brodrick*, for the Appellants.

C. A.

1882

In re HENRY SMITH'S CHARITY (HARTLEPOOL).

Davey, Q.C., and *Cecil Russell, contrà*, were not called upon.

JESSEL, M.R.:—

Why the trustees should have appealed in this case I cannot see. It is true that the Court does not interfere readily or capriciously to alter schemes which have been settled by the Court, but here I think there was a slip in the scheme. A report was made in 1846, and a scheme proposed by it was confirmed in the same year. The *Charitable Trusts Act* was passed in 1853, and a decree approving of a fresh scheme for this charity was made in 1856, which modified the power of granting leases contained in the scheme of 1846. When that order was made I think it must have been overlooked that the Act of 1853 gives a power of granting leases on any terms approved by the Charity Commissioners. This Act establishes a general system, and what is good for all *England* must be good for the town of *Hartlepool*. It is urged that renewable leases for twenty-one years are found to work better than any others, but that is not the effect of the evidence, which only comes to this, that they work better than leases for such terms certain as are mentioned in the evidence. That only shews that leases for those terms do not work well in *Hartlepool*. The experience of the Court is that renewable leases are wasteful, and that is so for various reasons. Lessees do not like such leases, because they know that if by accident they do not pay the fine they are in danger of losing the property. Then there is expense on every renewal, not merely the expense of the new lease, but the expense of shewing the title of the person who claims the right of renewal. Lessees take all these matters into account, and will give better terms if they are relieved from them. It is therefore found by experience to be more beneficial to landlords to grant leases for fixed terms, and it is well known that consequently all the great corporations have given up the granting of renewable leases.

LINDLEY and HOLKER, L.JJ., concurred.

Solicitors: *Clabon; Bell, Brodrick & Gray.*

H. C. J.

ATTORNEY-GENERAL *v.* GASKILL.

C. A.
1882
V.-C. B.
Jan. 20, 21, 27;
C. A.
March 8.

[1881 A. 1233.]

Practice—Interrogatories—Rules of Court, 1875, *Order* XXXI., *rr.* 1—10.

An action was brought by the Attorney-General and a local board to restrain the Defendant from building across a public footpath. The amended statement of claim alleged that at a meeting of the board held after the commencement of the action the Defendant had attended and signed an agreement for settling the action on certain terms, and the Plaintiffs sought to enforce this agreement, or, in the alternative, to restrain interference with the footpath by virtue of their original title. The Defendant, by his defence, denied the existence of any public right of way over the ground. He admitted the signature of the agreement, but alleged that it was obtained by threats and pressure after a long conversation and argument, and without his having it read and explained to him. The Plaintiffs delivered interrogatories as to the existence of a public right of way over the land, and as to what passed in the conversation at the board meeting, and at a conversation between the Defendant and the Plaintiffs' solicitor before that meeting. The Defendant declined to answer those interrogatories, alleging that as to the right of way he was not bound to answer as to a right which he had denied by his pleadings; and that as to the conversations he ought not to be called upon to answer till the Plaintiffs' solicitor had been examined and cross-examined as to the conversation:—

Held, by *Bacon*, V.C., that the Defendant having by the statement of defence denied the existence of the right of way was not bound to answer as to it; and that he was not bound to answer as to the conversations, no discovery being requisite as to facts which the Plaintiffs had the means of establishing:

Held, by the Court of Appeal, that the Defendant was bound to answer as to the existence of the right of way, for that one object of interrogatories is to enable a party to obtain admissions from the other party, and so to relieve himself from the necessity of adducing evidence:—

Held, also, that as the conversations were material on the issue whether the agreement had been unduly obtained, the Defendant must answer as to them; and that it would not be right to allow him to delay answering until he saw what account another person would give of what had taken place.

The right of discovery as existing in the Court of Chancery still exists, except so far as it is modified by the Judicature Acts and the General Orders; and a party still has a right to exhibit interrogatories, not only for the purpose of obtaining from the opposite party information as to material

C. A.
1882
ATTORNEY-GENERAL
v.
GASKILL.

facts which are not within his own knowledge and are within the knowledge of the opposite party, but also for the purpose of obtaining from the opposite party admissions which will make it unnecessary for him to enter into evidence as to the facts admitted.

THIS was an action by the Attorney-General at the relation of the local board of *Long Eaton*, and by the local board, against *William Gaskill*. The statement of claim alleged that there existed as of right a highway or public footpath over a close called "*Haycroft Close*," within the district of the board. That in June, 1880, a part of the close was laid out for building purposes, and that the owner proposed to form a street crossing the footpath. That *Gaskill* had given notice to the board of his intention to build certain houses in this new street, and had deposited plans of the buildings at their office. That the board had declined to approve of the plans till they were furnished with a block plan shewing the exact position of the footpath. That a block plan was thereupon furnished which shewed that the buildings would interfere with the footpath. That on the 24th of June Mr. *Sheldon*, the surveyor of the board, wrote to the Defendant to say that the board did not object to the buildings if the path was not interfered with. That the Defendant then went on and completed four houses which did not interfere with the path, but afterwards, without any further notice to the board, began to erect three more, one of which wholly obstructed the path. That the surveyor of the board then gave the Defendant notice that so much of his buildings as interfered with the path must be removed; and after some attempts at an arrangement to be effected by a diversion of the footpath, this action was commenced to restrain the Defendant from building so as to interfere with the footpath.

By an amended statement of claim delivered in April, 1881, it was alleged that on the 29th of November, 1880, after the commencement of the action, the Defendant had attended a meeting of the board and offered to undertake not to build on any part of the *Haycroft Close* not already built upon until the path should have been diverted by a competent authority, provided the board agreed not to take in the meantime any proceedings to compel

him to pull down anything he had built. That the board agreed to those terms provided the Defendant paid the costs of the action. That the Defendant objected to this and left the room, but afterwards returned and signed a memorandum embodying the terms agreed upon. The amended statement of claim sought to enforce this memorandum, or in the alternative to restrain interference with the footpath on the original ground.

The Defendant by his statement of defence, denied that there was any public footpath over the close. He also set up the case that the memorandum which he signed on the 29th of November was signed under pressure, and without his having had it properly explained to him. He stated that on the 29th of November the Plaintiffs' solicitor had met him and persuaded him to attend the meeting. That when he was called in the chairman endeavoured by threats and pressure to induce him to agree to pay the Plaintiffs' costs, but that the Defendant refused. That he then left the room, but was afterwards recalled, when a long conversation took place, at the end of which he went away to catch a train, but was recalled by the chairman, who induced him to sign the memorandum for settling the action and paying the Plaintiffs' costs without its being read over or explained to him.

The Plaintiffs delivered interrogatories for the examination of the Defendant, which so far as need be stated were to the following effect: 1. Whether there was not in June, 1880, or at some and what time before the Defendant commenced his building operations, a public footpath over the close? 2. Whether the Defendant had not after the notice given him in June, 1880, proceeded to build so as to obstruct the footpath? 3. Whether the Defendant did not on a certain day call on the Plaintiffs' solicitor and offer to settle the action, and whether the conversation was not to the effect stated in the interrogatory? and the Defendant was further interrogated as to what passed at the board meeting.

The Defendant objected to answer the first and second interrogatories, on the ground that it was an abuse of the process of the Court to ask an admission or denial on oath by the Defendant of matters which were in issue between him and the Plaintiffs and as to which the burden of proof was on the Plaintiffs. He

C. A. 1882 — ATTORNEY-GENERAL v. GASKILL.

objected to answer the interrogatories as to the conversations, on the ground that it was improper to ask him as to a conversation between him and the Plaintiffs' solicitor until the solicitor had been examined and cross examined with reference thereto.

The Plaintiffs took out a summons for the Defendant to put in a further answer, and it came on to be heard before Vice-Chancellor *Bacon* on the 20th of January, 1882.

R. Horton Smith, Q.C., and *Speed*, for the summons :—

The practice is now governed by Order XXXI., rules 1 to 10. The former practice is described in *Wilson* (1). Formerly there were limits to a Plaintiff's right to discovery, and the existing right is still regulated by the old rules: *Anderson* v. *Bank of British Columbia* (2). "A person answering is obliged to answer fully, unless he can make out an exceptional case, viz., that the discovery is sought vexatiously or oppressively, or is discovery which it will be burdensome or injurious to the Defendant to give, and which probably may never be used at all:" *Saull* v. *Browne* (3). Another general rule was laid down in *Attorney-General* v. *Corporation of London* (4), namely, that a Plaintiff is entitled to discovery from the Defendant, not only of that which constitutes the Plaintiff's case, but also for repelling what he anticipates will be the case of the Defendant: *Wigram* on Discovery (5). The principle is further illustrated in *Saunders* v. *Jones* (6); *Lyon* v. *Tweddell* (7).

The facts we seek to establish are, 1. the existence of this public right of way; and 2. that an agreement for a compromise was come to between the Defendant and the board on the 29th of November, 1880. As to these facts we interrogate the Defendant, and we ask him, "Did you not call on a certain day, and were you not told so and so." This he refuses to answer, perhaps relying on the authority of *Johns* v. *James* (8), in which the head-note goes beyond what was really decided. The head-note is right in stating that an interrogatory, whether it was the fact that certain

(1) 2nd Ed. p. 228.
(2) 2 Ch. D. 644.
(3) Law Rep. 9 Ch. 364, 367.
(4) 2 Mac. & G. 247.
(5) 2nd Ed. p. 261.
(6) 7 Ch. D. 435.
(7) 13 Ch. D. 375.
(8) Ibid. 370.

allegations as to a conversation made by the opponent were true, was disallowed by the Court; but wrong in going on to state that an interrogatory, whether it was the fact that allegations as to a conversation made by the interrogating party were true, was disallowed. The Court did not in *Johns* v. *James* (1) do this. It is not competent to an interrogating party to ask, "Have you not told an untruth?" but it is competent to him to ask, "Is not my version of what took place the true one?" *Commissioners of Sewers of the City of London* v. *Glasse* (2).

Marten, Q.C., and *J. G. Wood*, for the Defendant:—

This proceeding is set on foot solely for the sake of costs. The Plaintiffs seek to establish the fact that this is an ancient foot-path. The onus of proof is on them. We have denied the fact, by our defence, and to ask us whether we admit it, is purely and simply vexatious.

Then as to the conversation; they know already what we say the effect of it was. Our case is that the Plaintiffs' solicitor said the costs would not exceed £30. They want an answer, not for any purpose of discovery, but with the object of producing evidence at the trial. This they are not entitled to have: *Benbow* v. *Low* (3). In the words of the Master of the Rolls (4), it would be giving a rogue an immense advantage. As to the general scope and purport of a conversation, the interrogating party is entitled to have an answer; but not as to the details: *Eade* v. *Jacobs* (5); *Lyon* v. *Tweddell* (6).

The criticism on the report in *Johns* v. *James* is not sound. The interrogatory in *Johns* v. *James* was in substance our interrogatory, namely, "Have you not given an incorrect version of the conversation, and was not the true substance of it this?" and the Court held that such an inquiry was too much like asking the opponent, "Have you not told an untruth," and disallowed it altogether.

R. Horton Smith, in reply.

(1) 13 Ch. D. 370.
(2) Law Rep. 15 Eq. 302.
(3) 16 Ch. D. 93.
(4) 16 Ch. D. 95.
(5) 3 Ex. D. 335.
(6) 13 Ch. D. 375.

C. A. 1882 ATTORNEY-GENERAL v. GASKILL.

BACON, V.C.:—

Allowing interrogatories is a matter in the discretion of the Court. It was so under the old practice. The Court never allowed harassing interrogatories on matters of trifling importance.

In this case the first interrogatory is as to the existence of a public highway, such as is alleged in the statement of claim. That is a question of law as to which the Defendant by his answer has already declined to admit the truth of the Plaintiffs' allegation. That was a perfectly good pleading, and being a matter of pleading, no discovery can be asked for as to that. I find there is no evasion, no unreasonable opposition offered to the fair trial of the question raised by the statement of claim, and I accordingly disallow this interrogatory.

Then as to the meeting of the 29th of November, it would be an abuse of the practice of the Court to permit the Plaintiffs to harass the Defendant by insisting upon categorical answers as to facts which the Plaintiffs have abundant means of establishing for themselves and as to which they want no discovery whatever. The allegation of the defence is that the Defendant was required to sign a memorandum under undue pressure and duress. That is what the Defendant has to prove, and when the trial comes we shall see what the evidence amounts to. In the meantime, in my opinion, these interrogatories proceed upon an erroneous notion of the law and practice of the Court. Answers substantially distinct and unevasive to the allegations in the statement of claim have been given by the Defendant in his statement of defence, and the Plaintiffs are, in my opinion, entitled to no further discovery upon these points.

Several cases have been referred to; amongst others some decisions of my own. All I observe upon these cases is this, that the original powers of the Court of Chancery to compel discovery exist in all the force they ever had; but the practice of the Court in obtaining that discovery has undergone most material changes. It is limited by the enactments of the *Common Law Procedure Act*, and by the adoption of that Act by the *Judicature Act*; and further by the discretion which the Court is bound to exercise upon all occasions in deciding whether the interroga-

tories which it is proposed to exhibit are necessary to the ends of justice, and in accordance with the rights of the interrogating party, or are merely a harassing attempt, by reviving an obsolete practice, to impede and obstruct the hearing of the cause, and the decision of the real question between the parties.

I therefore disallow these interrogatories.

J. B. D.

C. A.

The Plaintiffs appealed. The appeal was heard on the 8th of March, 1882.

R. Horton Smith, Q.C., and *Speed*, for the Appellants, having opened the case, were stopped by the Court.

Marten, Q.C., and *J. G. Wood*, for the Defendant:—

These interrogatories are framed according to the old Chancery practice, which has been altered by the Judicature Acts.

[JESSEL, M.R.:—The old practice prevails except so far as the Act and rules alter it, and what is there in them to prohibit these interrogatories?]

The practice is now governed by Order XXXI., rules 1–10, which allow the objection to be taken that interrogatories are unreasonable, which we say these are. But indeed this is in substance an action of ejectment, and the Plaintiffs have no right to interrogate at all. Supposing that objection got over the first interrogatory is improper. The Defendant has denied by his defence the existence of a public footpath over the land, and the Plaintiffs have no right to interrogate him as to whether the statement in his pleading is true.

[JESSEL, M.R.:—That doctrine is new to me.]

Johns v. *James* (1) supports it. Under the Judicature Acts the object of interrogatories is to obtain discovery of what the Plaintiff does not know, not to obtain evidence to be used at the trial, and the Plaintiff is not entitled to interrogate for the latter purpose: *Benbow* v. *Low* (2). If the decision is against the Defendant in this case, it will sanction a revival of the old practice of interrogating all through a bill.

(1) 13 Ch. D. 370. (2) 16 Ch. D. 93.

C. A.
1882
ATTORNEY-GENERAL v. GASKILL.

[JESSEL, M.R.:—The 2nd rule of Order XXXI. was inserted in order to put a check on an abuse of the right to interrogate.]

The Plaintiffs have no right to require a discovery on oath as regards matters at issue between the parties, well known to them, and as to which the burden of proof is on the Plaintiffs: *Eade* v. *Jacobs* (1) is against the right of the Plaintiffs to obtain the answers they ask for as to the conversations.

JESSEL, M.R.:—

This is an appeal from a decision of Vice-Chancellor *Bacon*, which, with great deference to that learned Judge, appears to have proceeded upon some misapprehension as to the effect of the Judicature Acts. They do not alter the rules as to discovery, except so far as there are express rules on the subject. Subject to the rules the old practice remains. I must not, by saying that, be supposed to encourage the practice of interrogating to all the statements in the statement of claim, which was a common practice on bills before the passing of the *Judicature Act*. That is an abuse, but there are modes of checking it in the existing orders, and I hope that in a very short time a still more effective check will be provided.

In this case the Attorney-General and a local board are Plaintiffs, and their case is that the Defendant has built a house or houses across a public footway or public highway. They further say that he made an agreement at a meeting of the local board as to settling the action upon certain terms which they seek to enforce, or, in the alternative, to make him pull down the house. By his defence he denies the existence of the alleged public footpath across the close in question, and he also impeaches the agreement. Thereupon the Plaintiffs exhibit interrogatories which are divided into two parts. The first part asks the Defendant whether there is not such a public footpath, and whether this public footpath has not existed for a great number of years, and been used by the public. The second part of the interrogatories relates to the conversation which took place on the 29th of November, 1880. The Defendant admits the signing of the agreement, but he alleges that it was invalid because it was extorted from him by

(1) 3 Ex. D. 335.

pressure or threats, and the object of asking these questions as to the conversation is to shew what the conversation was which took place when the agreement was signed, and that there was no pressure or threat. The questions asked by both these sets of interrogatories are material, and there is no objection on that ground.

The objection taken to the interrogatories as to the right of way is this: it is said that they seek an admission or denial on oath by the Defendant on matters in issue between him and the Plaintiffs as to which the onus of proof is on the Plaintiffs. That is no reason at all. It is because there is the obligation of proof on the Plaintiffs that they ask the question. If the Defendant were to admit the Plaintiffs' title, the Plaintiffs would be relieved of the obligation of proof, and would get judgment at once. But if he does not admit the whole he may admit part of it, and to that extent the Plaintiffs may relieve themselves of the obligation of proof. Recollect what that obligation involves in a case like the present. It involves the calling of a great number of old people to prove the use of this footpath as a public footpath for many years past. It causes great expense and trouble. I am therefore of opinion that the interrogatories as to the right of way must be answered.

As regards the interrogatories relating to the conversation, the Defendant says, I object that these interrogatories are wholly improper in seeking to examine me as to a conversation between me and the Plaintiffs' solicitor before such solicitor has been examined and cross-examined at the trial in reference thereto. That is, he wishes to hear what the Plaintiffs' solicitor will say about it before he states on oath what he recollects about it. The answer is very simple. The solicitor is not a party and he is. The Plaintiffs have a right to get from him his version, to the best of his recollection, of the conversation, and may get such a version as will satisfy them that they need not call the solicitor at all. The Defendant has no right to say I will not state on oath what my version of the matter is, because, if you call the solicitor, he may make some statements more advantageous to me.

If these interrogatories are answered it may possibly happen that the Plaintiffs will find that they have no need to call any

C. A. 1882 ATTORNEY-GENERAL v. GASKILL. Jessel, M.R.

witnesses. Now, one of the great objects of interrogatories when properly administered has always been to save evidence, that is to diminish the burden of proof which was otherwise on the Plaintiff. Their object is not merely to discover facts which will inform the Plaintiff as to evidence to be obtained, but also to save the expense of proving a part of the case. It seems to me that there is no valid ground for the Defendant declining to answer these interrogatories, and that the summons must be allowed with the usual consequences.

COTTON, L.J.:—

I am of the same opinion, and should think it unnecessary to add anything but for the line of argument which has been taken on the part of the Respondent. It was contended that everything which related to discovery existing in the practice of the Court of Chancery before the *Judicature Act* must be thrown aside as a matter of the past having no application to the present state of things, but that to my mind is a complete mistake. The *Judicature Act* enables every one as of right to interrogate his opponent, putting by Order XXXI., rule 2, certain checks on the exhibiting useless interrogatories. It enables a person who is called upon to answer interrogatories to defend himself from answering in a way in which he could not have done in former days, but the right to discovery remains the same, that is to say, a party has a right to interrogate with a view to obtaining an admission from his opponent of everything which is material and relevant to the issue raised on the pleadings. It was said in argument that it is not discovery where the Plaintiff himself already knows the fact, but that is a mere play on the word "discovery." Discovery is not limited to giving the Plaintiff a knowledge of that which he does not already know, but includes the getting an admission of anything which he has to prove on any issue which is raised between him and the Defendant. To say that the pleadings have raised the issues, and that therefore the interrogatories should not be allowed is an entire fallacy. The object of the pleadings is to ascertain what the issues are, the object of interrogatories is not to learn what the issues are, but to see whether the party who interrogates cannot obtain an admission from his opponent which

will make the burden of proof easier than it otherwise would have been. As regards the interrogatories relative to the right of way they clearly are proper interrogatories. The object is to get from the Defendant in this case an admission of that which no doubt he denied by his defence, but not on oath, viz. a fact supposed to be within his knowledge that there is a right of way, and an admission of it by him must obviously save an enormous amount of expense at the trial.

As regards the conversations, both parties consider that they are material, and the only objection taken to the interrogatories relating to them is that mentioned by the Master of the Rolls. The Defendant seems to think that he has a right to know what the Plaintiffs' solicitor who was present will state before he pledges himself on oath to what his view of the conversation was. In my opinion it would be entirely wrong to let a person who is bound to give discovery wait till he can shape his answers according to what is stated by the witnesses on the other side. A judgment of my own in *Eade* v. *Jacobs* (1) was referred to, but I think it has been somewhat misunderstood. In that case the defence had set up a parol agreement which was said to be material, and what I held was this, that the interrogatories ought to some extent to be limited, so as to ask the Defendant to give discovery of the substance only of the conversation on which he relied as a defence, and that the person interrogated was not bound to set forth the names of the witnesses or the details of the conversations. That was expressed in this passage of the judgment: "I think that the Plaintiff is entitled to a discovery of the facts upon which the Defendant relies to establish his case, but not of the evidence which it is proposed to adduce," and the rest of the judgment, modifying in some slight way the interrogatory, has reference to what I laid down as the principle of the decision.

I may add that nothing I have said must be taken to encourage in any way the going back to the old practice of interrogating as a matter of course to every single allegation in the statement of claim without regard to the question whether it is reasonable or not that discovery should be asked for as to those facts. That is checked by Order XXXI., rule 2, and probably will hereafter be checked in a more efficacious way.

(1) 3 Ex. D. 335, 337.

C. A.
1882
ATTORNEY-GENERAL v. GASKILL.

LINDLEY, L.J.:—

I am of the same opinion, and will only make one or two additional remarks with reference to the passage in the judgment of the Vice-Chancellor which runs thus: "The original powers of the Court of Chancery to compel discovery exist in all the force that they ever had, but the practice of the Court in obtaining that discovery has undergone most material changes. It is limited by the enactments of the *Common Law Procedure Act*, and by the adoption of that Act by the *Judicature Act*, and further by the discretion which the Court is bound to exercise upon all occasions in deciding whether the interrogatories which it is proposed to exhibit are necessary to the ends of justice, and in accordance with the rights of the interrogating party, or are merely a harassing attempt, by reviving an obsolete practice, to impede and obstruct the hearing of the cause." There appears to me to be a certain amount of forgetfulness in that passage. Under the *Common Law Procedure Act* it was necessary to get leave to deliver interrogatories. The practice as to interrogatories under the *Common Law Procedure Act* is abolished by Order XXXI., except in the case of a corporation, which is provided for by rule 4 of that Order. You can now, both in the Common Law Division and in the Chancery Division, deliver interrogatories without any leave of the Court. No doubt the practice has been changed very much in this respect, that now the statement of defence and the answers to the interrogatories are two different documents, and it would be an abuse of the power of interrogating to require a party to admit on oath that which he has already admitted in his pleadings, and the Courts of the Common Law Division have so far adopted that view as to decline to allow a plaintiff to deliver interrogatories before the statement of defence is put in, because it is possible that the Defendant may admit a great deal of that to which the interrogatories would be addressed. Except as altered by the rules the old practice of the Court of Chancery remains, the theory remains the same, and it is no reason for declining to answer the interrogatories to say that the same information may be got by cross-examination at the trial. The functions of discovery and the functions of cross-examination are totally different. The Plaintiff is entitled now, as he always

was, not only to discovery of facts not in the knowledge of the Plaintiff or of facts which the Defendant knows personally and which the Plaintiff does not know, but he is also entitled to admissions if he can get them, as he very often can, so as to render it unnecessary to adduce evidence.

Now as regards this highway I do not see anything oppressive, wrong, or vexatious, in asking the Defendant whether he will or will not admit on oath that there is such a highway as alleged. It appears to me to be perfectly legitimate to ask him that. As regards the conversations it appears to me to be within the proper use of interrogatories to ask him what, to the best of his belief, took place or was said on the occasions and at the interviews referred to. The extent to which that power of interrogating goes is to be found in the case of *Eade* v. *Jacobs* (1). That decision proceeds upon this, that a party is not to be compelled by means of interrogatories to disclose the evidence which he intends to adduce at the trial. So understood, the case is a guide as to the extent to which the interrogatories about the conversations must be answered; but the Defendant here has declined to answer at all. That cannot be right. It appears to me that the appeal must be allowed, and that further answers must be put in.

Solicitors for Plaintiffs: *Taylor, Hoare, & Taylor.*
Solicitor for Defendant: *F. Needham.*

(1) 3 Ex. D. 335.

H. C. J.

V.-C. B.

1882

April 23.

HOLROYDE *v.* GARNETT.

[1881 H. 2467.]

Writ of Attachment—Defaulting Trustee—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 4—*Debtors Act*, 1878 (41 & 42 *Vict. c.* 54), *s.* 1.

On application for an attachment against a defaulting trustee, the Court has jurisdiction to inquire into the circumstances of the case, and where there has been no actual fraud or embezzlement, but merely an erroneous application of the trust fund, may refuse the application for an attachment.

Barrett v. *Hammond* (1) followed.

Marris v. *Ingram* (2) distinguished.

MOTION on behalf of Plaintiff for liberty to issue a writ of attachment against the Defendant, *D. Garnett*, for contempt of Court in not having paid into Court £400, with interest at 4 per cent. from the 16th of March, 1881, pursuant to the judgment in this action of the 9th of March, 1882, whereby he was ordered, on or before the 9th of April, 1882, to make this payment.

The action was brought for the purpose of removing the Defendant *Garnett* from being trustee of a settlement of the 3rd of September, 1877, by which £400 was settled by Mrs. *Rhodes* upon trusts for the benefit of her daughter, the Plaintiff, Mrs. *Holroyde*, to enforce payment into Court of the £400 by *Garnett*, who had received but had not invested the money, and to have the same secured for the benefit of the Plaintiff.

It appeared that the settlement transaction had been carried out by *William Rhodes*, who was the Plaintiff's brother, and *Garnett's* partner, and that the £400 was handed over to *Garnett* as trustee of the settlement by *William Rhodes*. Before any interest fell due the £400, with the knowledge and concurrence of the Plaintiff and her mother, was returned by *Garnett* to *William Rhodes* upon his undertaking to pay the interest to the Plaintiff. The Plaintiff was not on friendly terms with her brother, and requested *Garnett* to pay her the interest, and then get it back from *William Rhodes*. This was done until 1881, when *Garnett*, having taken proceed-

(1) 10 Ch. D. 285. (2) 13 Ch. D. 338.

ings against *William Rhodes* for recovery of the £400, obtained judgment for the amount, and *William Rhodes* was thereupon adjudicated bankrupt. Previously to this, in November, 1880, *Garnett* had brought an action against *William Rhodes* for dissolution of partnership, in which action a dissolution was ordered and a receiver appointed. The Plaintiff having brought this action against *Garnett*, an order was made on the 9th of March, 1882, for payment of the £400 into Court within a month, with interest thereon at 4 per cent. from the 16th of March, 1881. *Garnett* having failed to comply with this order the Plaintiff now moved for leave to issue a writ of attachment.

In his affidavit, filed upon this motion, *Garnett* stated that he had attempted to provide funds for replacing the £400 by having his property put up for sale, but that the price realized was not sufficient to satisfy a bill of sale upon the property; that he had no present means of paying the £400, and that, if imprisoned, he should be unable to give any assistance to realizing the partnership assets and taking the accounts in the action pending between himself and *William Rhodes*, without which all prospect of being able to pay the sum of £400 would be lost, and he (*Garnett*) would be irretrievably ruined. He offered to execute a charge for the amount on the whole of his property.

G. Williamson now moved, under Rules of Court, 1875, Order XLIV., r. 2, for liberty to issue a writ of attachment against *Garnett*.

Yate Lee, for *Garnett*, submitted that this was a case for the exercise of the discretion reposed in the Court by the Act of 1878. The application for an attachment to send *Garnett* to prison would not enable him to pay the money, and the policy of the Act was not vindictive but simply to produce payment of the money: *Barrett* v. *Hammond* (1); *Street* v. *Hope* (2).

G. Williamson, in reply:—

Barrett v. *Hammond* was not followed by the Master of the

(1) 10 Ch. D. 285. (2) 10 Ch. D. 286, n.

V.-C. B. 1882 HOLROYDE v. GARNETT.

Rolls in *Marris* v. *Ingram* (1), where it is distinctly stated that the object of the *Debtors Act* was vindictive in the sense of being intended for the punishment of a fraudulent or dishonest debtor.

BACON, V.C.:—

This subject has undergone discussion both here and before the Master of the Rolls, who appears to have differed from some of the expressions which I used. In *Barrett* v. *Hammond* (2), referring to the jurisdiction given to the Court by the *Debtors Amendment Act*, 1878, of inquiring into the case, and the discretion of granting or refusing the application, I said that the law did not act vindictively, and that the Court had not power to inflict any punishment upon the man. In *Marris* v. *Ingram* the Master of the Rolls stated that the Act, though it abolished imprisonment for debt in certain cases, was vindictive in the sense of being intended for the punishment of fraudulent or dishonest debtors. But a fraudulent misapplication is one thing and an erroneous application is quite another thing. The Act of 1878, under which a very anxious and delicate discretion is to be exercised by the Court, clearly had for its object that the Court should take into consideration the circumstances of each case, and the jurisdiction is only vindictive so far as it may be exercised to punish fraudulent misapplications, in which case the power of imprisonment would be exercised without hesitation. This case is very different from the case before the Master of the Rolls, in which there had been an actual embezzlement, that is to say, a fraudulent act by the person who had failed to comply with the order for payment of the money into Court. Here all that the trustee has done was to hand over the money to the brother of the *cestui que trust* instead of investing it. There is nothing to shew that there has been any fraudulent intention in so doing, and although such an act is called by the law fraudulent, there has been no dishonesty. Misapplication there has been, but no actual fraud or embezzlement. The trustee, desiring not to have this rigorous order made against him, proposes to give a charge upon any moneys coming to him in the

(1) 13 Ch. D. 338. (2) 10 Ch. D. 285.

partnership action and on all his other property; and I think, that being so, that the order ought not to go, but that the motion should stand over until after the charge has been executed. The costs will be costs in the action.

Solicitors: *Williamson, Hill, & Co.*, agents for *Walter Storey, Halifax; Peace & Waller*, agents for *Godfrey Rhodes, Halifax.*

F. G. A. W.

V.-C. H.

1882

March 21.

In re HARWOOD (INFANTS).

Practice—Vesting Order—Infant—Stock in Name of Infant and another to which Infant was entitled—Trustee Extension Act, 1852 (15 & 16 *Vict. c.* 55), *s.* 3 [*Revised Ed. Statutes, vol. xi. p.* 326].

Where stock to which an infant was beneficially entitled had been invested in the joint names of himself and another person :—

Held, that the Court had jurisdiction under the 3rd section of the *Trustee Extension Act*, 1852, to make an order vesting in such other person the right to transfer such stock.

PETITION.

Robert Harwood died in August, 1869, intestate, and leaving a widow and two infant children.

Letters of administration were granted to the widow, who, in January, 1870, invested the one-third share of each of the infants in the intestate's net personal estate in the purchase of £232 17*s.* 8*d.* New £3 per Cents. in the names in each case of the maternal grandfather (*H. G. B. Johnson*), the widow herself, and the infant.

In November, 1881, the widow, who had received the dividends during her life, died, and shortly afterwards an originating summons was taken out by a relative for the appointment of a guardian, and for maintenance for the infants out of the two sums of £232 17*s.* 8*d.* stock; and the summons asked that *H. G. B. Johnson* might be ordered to transfer those sums into Court to the accounts of the infants respectively.

Upon the summons coming on in Chambers, the Chief Clerk expressed his opinion that the *Bank of England* would, in view of the decision in *Frodsham* v. *Frodsham* (1), decline to act upon an order made in Chambers for the transfer of a fund, and upon inquiry at the will office of the *Bank of England* it was ascertained this was so. Thereupon this petition was presented by the infants and their grandfather *H. G. B. Johnson*, intituled in the matter and in the *Trustee Acts*, asking that the right to transfer the two sums in question might vest in *H. G. B. Johnson* alone, and

(1) 15 Ch. D. 317.

that he might be at liberty to transfer them into Court to the account of the infants.

G. Goldney-Cary, for the Petitioners, submitted that by the investment a trust was created so as to bring the case within the 3rd section of the *Trustee Extension Act*, 1852, which empowers the Court where an infant is entitled jointly with any other person to any stock upon a trust to make an order vesting the right to transfer in the person jointly entitled with the infant. He referred to *Frodsham* v. *Frodsham* (1), *Re Westwood* (2) and *Sanders* v. *Homer* (3).

Kekewich, Q.C., suggested, on behalf of the *Bank of England*, that the 3rd section of the Act of 1852 only contemplated a case where the infant and his joint stockholder were both entitled as trustees; and referred to *Gardner* v. *Cowles* (4).

HALL, V.C.:—

I think the case comes within the words of the 3rd section of the Act of 1852. Whether they were intended to cover a case like the present is another question, but I shall make the order.

Solicitor: *G. R. Burn.*

(1) 15 Ch. D. 317.
(2) 6 N. R. 61, 316.
(3) 6 W. R. 476.
(4) 3 Ch. D. 304.

W. W. K.

FRY, J
1882
March 18.

In re BOWEN.
BENNETT *v.* BOWEN.

[1881 B. 262.]

Administration Action—"Ordinary Account"—Executor—Wilful Default—District Registrar—Jurisdiction—Form of Report—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *ss.* 64, 66—*Rules of Court*, 1875, *Order* III., *r.* 8—*Order* XV., *r.* 1—*Order* XXXV., *rr.* 1*a*, 4.

A claim against an executor for an account on the footing of wilful default is not a "case of ordinary account" within the meaning of rule 8 of Order III., and consequently a summary order for such an account cannot be made under rule 1 of Order XV.

By virtue of rules 1a and 4 of Order XXXV., a District Registrar has power to make an order for an account under rule 1 of Order XV., and if the order so directs (but not otherwise) he can then proceed to take the account himself.

In re Smith (1) followed.

In making a report to the Court under sect. 66 of the *Judicature Act*, 1873, of the result of an account in an administration action, the District Registrar ought to adopt the form of a Chief Clerk's certificate, and to state in the report the persons who were present before him, and the materials upon which he proceeded.

ADJOURNED SUMMONS.

The writ in this action was issued out of the *Swansea* District Registry on the 19th of July, 1881, by *Benjamin Bennett* and *Catherine* his wife, as Plaintiffs, against *Catherine Bowen* and *John Walters* and *Elizabeth* his wife as Defendants.

The indorsement on the writ stated that the Plaintiff *Catherine Bennett* claimed as a legatee under the will, dated the 12th of November, 1877, of *David Bowen*, deceased, to have the personal estate of the testator administered.

It was also stated that the Defendant *Catherine Bowen* was sued as the executrix of the testator to whom probate had been granted, and that the Defendant *Elizabeth Walters* was also sued as an executrix to whom power had been reserved of making a like grant of probate.

It was further stated that the Plaintiffs claimed in the first

(1) 6 Ch. D. 692.

instance to have an account taken of the testator's personal estate received by the Defendant *Catherine Bowen* with which she was properly to be charged, or by any other person or persons by the order or for the use of the said Defendant, or which without the wilful neglect or default of the said Defendant might have been so received, and an account of the testator's personal estate outstanding or undisposed of.

The testator died on the 12th of April, 1878. By his will he gave the interest of his property to his wife, the Defendant *Catherine Bowen*, during her life or widowhood, and, after her death or marriage again, he bequeathed the principal to be divided between his six children in equal shares. And he appointed his wife and his daughter, *Elizabeth Walters*, to be joint executrixes and trustees of his will. The will was proved by *Catherine Bowen* alone, the estate being sworn under £300. The Plaintiff *Catherine Bennett* was a daughter of the testator.

The Defendant *Catherine Bowen* did not enter an appearance to the action.

On the 18th of August, 1881, the District Registrar in Chambers made the following order:—

"Upon the application of the Plaintiff under Order XV., rule 1, of the Rules of the Supreme Court, and upon hearing the solicitor for the applicant, and upon reading the writ of summons in this action, and indorsed under Order III., rule 8, and an affidavit of *B. Bennett*, and an affidavit of *W. Lewis* of service of the said writ on the Defendant *Catherine Bowen*, and no appearance for the said Defendant having been entered in the said action, and the summons for this order having been duly served on the said Defendant by being filed with the District Registrar, it is ordered that an account be taken of the personal estate of the late *D. Bowen*, deceased, received by the said Defendant *Catherine Bowen*, with which she is properly to be charged, or by any other person or persons by the order or for the use of the said Defendant, or which without the wilful neglect or default of the said Defendant might have been so received, and also an account of the said testator's personal estate outstanding or undisposed of; and the Judge, not requiring any trial of this action other than this application, doth order that the further consideration of this action be adjourned."

FRY, J.
1882
In re BOWEN.
BENNETT *v.* BOWEN.

On the 17th of December, 1881, the District Registrar made a report or certificate by which he certified "that the result of the accounts and inquiries which have been taken and made in pursuance of the order made in this action, dated the 18th of August, 1881, is as follows:—

"The Plaintiffs by their solicitor attended. The Defendant *Catherine Bowen* did not, nor has any person on her behalf attended, though duly summoned, service of such summons having been effected by leaving it at the District Registry, and a copy thereof having been forwarded to her, which she has duly acknowledged.

"The Defendant *Catherine Bowen*, the executrix of the said testator *D. Bowen*, has received personal estate of the said testator to the amount of £525, and she has paid or is entitled to be allowed on account thereof sums to the amount of £322 0*s*. 9*d*., leaving a balance due from her of £202 19*s*. 3*d*. on that account.

"The particulars of the above receipts and payments appear in the account verified by the affidavit of the Plaintiff *B. Bennett*, filed the 3rd of December, 1881, and which account is to be filed with this certificate, and an affidavit of the Plaintiff *B. Bennett*, filed on the 17th of December, 1881, and the account signed '*C. Bowen*,' thereunto annexed."

The certificate was transmitted by the Registrar to Mr. Justice *Fry*, to whose Court the action was attached. The Defendant objected before the Chief Clerk to the certificate, on the ground that it was not signed by the Registrar. This objection was referred to the Judge, and was overruled by him, and the matter was referred back to the Chief Clerk. The Plaintiffs afterwards took out a summons asking that the sum of £202 19*s*. 3*d*., found due from the Defendant *Catherine Bowen* by the District Registrar's certificate, might be forthwith paid into Court. The hearing of the summons was adjourned into Court.

In support of the summons the Plaintiff *B. Bennett* made an affidavit in which he said that he had been informed lately that a sum of £40, part of the property of the testator, had been improperly advanced by the Defendant *Catherine Bowen* to her son-in-law *John Walters*; and he said that she had admitted to

his solicitor that she had a sum of £140 in a bank, but she had refused to give any further information.

Catherine Bowen made an affidavit in which she said that £140, part of the testator's estate, was invested on deposit account in her name in the *Carmarthen* branch of the *National Provincial Bank of England;* that she had advanced £10 to *John Walters* on his promissory note; and that she had paid £20 to *B. Bennett* and his wife, £20 to *John Walters* and his wife, £20 to her son *William Bowen*, and £5 to her son *John Bowen*, on account of their respective shares of the testator's estate.

Ashton Cross, for the summons.

Hadley, for the Defendant *Catherine Bowen*:—

An account against an executor on the footing of wilful default is not an "ordinary account" within rule 8 of Order III., and therefore a summary order to take such an account cannot be made under rule 1 of Order XV. (1).

In order to obtain an account on the footing of wilful default, it is necessary to allege and prove at least one instance of wilful default: *Massey* v. *Massey* (2).

Moreover, the duties of the District Registrar under rule 1a of

(1) Order III. rule 8: "In all cases of ordinary account, as, for instance, in the case of a partnership or executorship, or ordinary trust account, where the plaintiff, in the first instance, desires to have an account taken, the writ of summons shall be indorsed with a claim that such account be taken."

Order XV. rule 1: "In default of appearance to a summons indorsed under Order III. rule 8, and after appearance, unless the defendant, by affidavit or otherwise, satisfy the Court or a Judge that there is some preliminary question to be tried, an order for the account claimed, with all directions now usual in the Court of Chancery in similar cases, shall be forthwith made."

Order XXXV. rule 1a, provides that: "Where an action proceeds in the district registry all proceedings, except where by any of the rules of the Supreme Court it is otherwise provided, or the Court or a Judge shall otherwise order, shall be taken in the district registry, down to and including final judgment."

Order XXXV. rule 4: "Where an action proceeds in a district registry, the district registrar may exercise all such authority and jurisdiction in respect of the action as may be exercised by a Judge at Chambers, except such as by these rules a Master of the Queen's Bench, Common Pleas, or Exchequer Division is precluded from exercising."

(2) 2 J. & H. 728.

FRY, J.
1882
In re
BOWEN.
BENNETT
v.
BOWEN.

Order XXXV. are purely ministerial, and he has no power to make an order for an account under rule 1 of Order XV. At any rate the Registrar has no power to take the account himself when the order does not expressly direct that he shall do so: *Irlam* v. *Irlam* (1); *In re Smith* (2); *Finlay* v. *Davis* (3).

The Registrar's report in this case is not one on which the Court will act. Under sect. 66 of the *Judicature Act*, 1873, the Court has a discretion whether it will act on the report or not; it is not equivalent to a chief clerk's certificate. There has been no inquiry as to the debts of the testator or the persons beneficially interested under his will. The order of the 18th of August, even if there was jurisdiction to make it, is a nullity.

Ashton Cross, in reply:—

The Registrar had jurisdiction to make the order; his duties are more than merely ministerial, and the terms of sect. 66 and rule 1a of Order XXXV. are wide enough. No case of wilful default having been raised before him, that part of the order which relates to it may be treated as mere surplusage. The decision in *In re Smith* is not binding on this Court. The Court has power to adopt the Registrar's report. The Defendant has delayed too long in raising her objections.

FRY, J. (after stating the facts and referring to rule 1 of Order XV., continued:—)

It is objected that the Registrar's order is a bad order on several grounds. It is said that it is a bad order under rule 1 of Order XV. for two reasons. First, it is said that the writ was not indorsed under rule 8 of Order III., and the question is whether a claim for an account against an executor on the footing of wilful default is a "case of ordinary account." In my judgment it is not. It is, perhaps, not very easy to say exactly where the border line is to be drawn between "an ordinary account" and an account which is not "ordinary;" but, bearing in mind the broad distinction which has always been taken between an account against an executor in a case where wilful default is alleged and proved, and a case where

(1) 2 Ch. D. 608. (2) 6 Ch. D. 692.
(3) 12 Ch. D. 735.

there is no such allegation or proof, I do not think I can hold that an account on the footing of wilful default is an "ordinary account." In the next place, it is said that the Registrar's order is not an order "with all directions now usual in the Court of Chancery in similar cases," and certainly it is a very remarkable order. *John Walters* and his wife are co-Defendants with *Catherine Bowen*. It appears that they were not present when the order was made, but there is no mention of any service of the writ on them. No inquiries are directed as to the debts of the testator or as to the persons beneficially interested under his will, and no service of the order on the beneficiaries is directed. It is simply an order for an account. It is certainly not an order "with all directions usual in the Court of Chancery in similar cases." It appears to me that it would be very difficult to work out such an order satisfactorily, because the proceedings under it would take place in the absence of the parties interested in the estate. As many accounts might have to be taken as there are beneficiaries.

The next question is, whether, supposing the order to be a proper one under rule 1 of Order XV., it is an order which a District Registrar has power to make, and this depends upon the construction of rules 1a and 4 of Order XXXV. It is not, in my opinion, clear upon rule 1a whether the order or judgment must be pronounced by the Judge. Although the proceedings are to be taken in the District Registry this does not preclude the pronouncing of judgment by the Judge, and the practice is well established of sending the papers from the District Registry to the Courts in *London*. But then comes rule 4, and it appears to me that this rule applies to an order made under rule 1 of Order XV., and that, if the Registrar had followed the provisions of that rule (which I have already decided he has not) he would have had power to pronounce such an order.

But, supposing that the order was rightly made, then the question arises whether the Registrar's report is one on which I ought to act under sect. 66 of the *Judicature Act*, 1873. Now Vice-Chancellor *Hall*, in *In re Smith* (1), held that a District Registrar has no power to take accounts which are directed by a judgment to be taken, unless the judgment expressly directs him to do so.

(1) 6 Ch. D. 692.

FRY, J.
1882
In re BOWEN.
BENNETT *v.* BOWEN.

In the present case the Registrar's original order did not direct that the account should be taken by himself. This practice has been established for five years, and I think I should be wrong in departing from it. The proceedings in the District Registry have therefore, in my opinion, been entirely wrong.

Moreover, the Registrar's report is a most unsatisfactory document. It does not shew on what materials he proceeded nor what persons, if any, other than the Plaintiffs, were present before him. In making such a report I think the Registrar ought to follow the precedent of a Chief Clerk's certificate, which enables the Court to see who was present and on what materials the certificate is founded. I am of opinion, therefore, that the report is open to objection, because the Registrar was not entitled to proceed to take the accounts, the original order not directing that he should do so, and because the report itself does not shew the materials on which it is founded. I am bound to say that the proceedings in the District Registry have been highly irregular.

It has, however, been urged that the Respondent has stood by and that it is now too late for her to object to the order or to the report. I do not, however, think that she has so acted as to be precluded from objecting to the proceedings for irregularity. But her objections have been taken in so piecemeal a fashion that, though I dismiss this summons, I shall dismiss it without costs.

Solicitor for Plaintiffs: *H. Keeble*, agent for *E. G. Jellicoe, Swansea.*

Solicitor for Defendant: *Robert Carter.*

W. L. C.

In re MAGGI.
WINEHOUSE *v.* WINEHOUSE.

[1879 M. 147.]

FRY, J.
1882
March 18, 20, 27.

Administration—Insolvent Estate—Bankruptcy Rules—Secured and unsecured Creditors—Priority—Judgment recovered against Executors before Administration Judgment—Judicature Act, 1875 (38 & 39 *Vict. c.* 77), *s.* 10—*Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 32.

Sect. 10 of the *Judicature Act*, 1875, does not introduce into the administration of insolvent estates of deceased persons the provision of sect. 32 of the *Bankruptcy Act*, 1869, that all debts (with certain exceptions) are to be paid *pari passu*.

Sect. 10 affects only the rights of the class of secured creditors as conflicting with those of the class of unsecured creditors; it does not affect the rights *inter se* of the members of those classes.

Therefore, if a creditor of an insolvent testator recovers judgment for his debt against the executor before the date of a judgment in an administration action, he is, notwithstanding sect. 10, entitled to be paid out of the assets in priority to the other creditors of equal degree.

Smith v *Morgan* (1) approved and followed.

ADJOURNED SUMMONS.

This action was brought for the administration of the estate of *N. L. Maggi*, whose will was proved on the 20th of January, 1879. The writ was issued on the 21st of January, 1879. The Plaintiff was one of the executors. The Defendants were the other two executors, and a person interested under the will. On the 29th of March, 1879, *W. J. Hill*, a creditor of the testator, commenced an action for his debt in the Exchequer Division against the executors as such. On the 9th of April, 1879, a receiver was appointed in the administration action, upon his giving security. On the 24th of April, 1879, *Hill* recovered judgment in his action for £73 4*s*. against the executors as such, they having by default in pleading admitted assets of the testator. On the 2nd of May, 1879, the ordinary administration judgment was given in the administration action. On the 19th of August, 1879, the receiver's recognizance was approved by the Judge. On the 1st of July, 1881, the Chief Clerk made his certificate in the administration

(1) 5 C. P. D. 337.

FRY, J.
1882
In re MAGGI.
WINEHOUSE *v.* WINEHOUSE.

action, by which he stated that the testator's estate had proved insufficient for the payment of his debts in full. He stated in a schedule the debts which had been allowed, among them being the debt for which *Hill* had recovered judgment. *Hill* had proved his debt in chambers by producing his judgment, which was admitted by the executors. At that time he supposed that the testator's estate was solvent. He was not served with notice of the administration judgment, and he did not obtain any order to attend the proceedings. On the 22nd of July, 1881, the action was heard on further consideration, and an order was made for payment of costs, and it was further ordered that the residue of the estate should be apportioned among the creditors rateably, in proportion to the total amounts which should be certified to be due to them, and that the apportioned sums should be paid to them accordingly.

The present summons was taken out by *Hill* on the 28th of February, 1882, asking that his judgment debt might be paid to him in full out of the assets standing to the credit of the action, in priority to all the other creditors. The fund in Court had not been divided. There was evidence that *Hill's* solicitors did not know that the testator's estate would be insufficient until the 28th of January, 1882. The testator's debts amounted to £3396; the fund in Court, which comprised the whole of the assets, amounted to a little over £2000.

Farwell, for the summons:—

My judgment entitles me to priority. Registration is not necessary for this purpose; nor is the right affected by the Act (32 & 33 Vict. c. 46) which abolished the distinction between specialty and simple contract debts: *Williams* v. *Williams* (1).

Sect. 10 (2) of the *Judicature Act*, 1875, does not affect this

(1) Law Rep. 15 Eq. 270.

(2) Sect. 10 provides that, "In the administration by the Court of the assets of any person who may die after the commencement of this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, and in the winding-up of any company under the *Companies Acts*, 1862 and 1867, whose assets may prove to be insufficient for the payment of its debts and liabilities and the costs of winding-up, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors . . . as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt."

right of priority: *In re Stubbs' Estate* (1): *Smith* v. *Morgan* (2); *In re Withernsea Brickworks* (3). The executors having admitted assets, I am entitled to recover against them personally, and they will be entitled to an indemnity out of their testator's estate.

Bramwell Davis, for the Plaintiff:—

No doubt before the *Judicature Act* the applicant would have been entitled to the priority which he claims, but sect. 10 has taken away that right. In *In re Stubbs' Estate* sect. 10 was not referred to, and the point did not arise, for the creditor had not recovered judgment before the administration decree was made. In *Smith* v. *Morgan* no reasons are given for the decision, and it does not bind this Court. The intention of sect. 10 is that in the administration of the assets of a deceased person who is insolvent the Bankruptcy Rules shall prevail, and it introduces the provisions of sect. 32 of the *Bankruptcy Act*, 1869, which requires, that, with certain exceptions, all debts shall be paid *pari passu*. Sect. 10 alters the rights of secured creditors *inter se*, and the rights of unsecured creditors *inter se*, as well as the rights of the two classes of secured creditors and unsecured creditors in conflict

---

Sect. 32 of the *Bankruptcy Act*, 1869, provides that "the debts hereinafter mentioned shall be paid in priority to all other debts. Between themselves such debts shall rank equally, and shall be paid in full, unless the property of the bankrupt is insufficient to meet them, in which case they shall abate in equal proportions between themselves, that is to say,

"(1.) All parochial or other local rates due from him at the date of the order of adjudication, and having become due and payable within twelve months next before such time, all assessed taxes, land tax, and property or income tax assessed on him up to the 5th day of April next before the date of the order of adjudication, and not exceeding in the whole one year's assessment;

"(2.) All wages or salary of any clerk or servant in the employment of the bankrupt at the date of the order of adjudication, not exceeding four months wages or salary, and not exceeding fifty pounds; all wages of any labourer or workman in the employment of the bankrupt at the date of the order of adjudication, and not exceeding two months wages:

"Save as aforesaid, all debts proveable under the bankruptcy shall be paid *pari passu*."

(1) 8 Ch. D. 154.

(2) 5 C. P. D. 337.

(3) 16 Ch. D. 337.

FRY, J.
1882
In re MAGGI.
WINEHOUSE v. WINEHOUSE.

with each other: *In re Richards & Co.* (1); *In re Summers* (2); *In re Hastings* (3); *In re Association of Land Financiers* (4).

[FRY, J., referred to *In re Albion Steel and Wire Company* (5).]

An executor cannot prefer a creditor after a receiver has been appointed in an administration suit: *In re Radcliffe* (6).

At any rate the applicant comes too late. He should have applied before the Chief Clerk's certificate was made: *In re Hopkins* (7); or, at any rate, before the order on further consideration was made.

Davenport, for the executors:—

This is an attempt to vary the order on further consideration.

Farwell, in reply:—

As to sect. 10, *Smith* v. *Morgan* (8) is distinctly in point, and so is the principle of the decision in *In re Withernsea Brickworks* (9). And the *ratio decidendi* of *Lee* v. *Nuttall* (10) governs the present case. The right of a judgment creditor to priority is a higher right than that of an executor to retain his own debt.

As to the alleged delay, the applicant did not know that the estate was insufficient until January last, long after the order on further consideration had been made. He is not a party to the action and has not been served with the administration judgment, and he could not attend the proceedings. He had no *locus standi*. A creditor who has not proved may come in and prove at any time so long as there are undistributed assets, not interfering with dividends already paid: *In re Metcalfe* (11).

FRY, J.:—

Two questions are raised, first, as to the application of sect. 10 of the *Judicature Act* of 1875; secondly, as to the diligence of the applicant.

(1) 11 Ch. D. 676.
(2) 13 Ch. D. 136.
(3) 6 Ch. D. 610.
(4) 16 Ch. D. 373.
(5) 7 Ch. D. 547.
(6) 7 Ch. D. 733.
(7) 18 Ch. D. 370.
(8) 5 C. P. D. 337.
(9) 16 Ch. D. 337.
(10) 12 Ch. D. 61.
(11) 13 Ch. D. 236.

As to the first question, the rule that a judgment obtained by a creditor of a testator against the executor, gives the judgment creditor priority over all other debts of the testator of equal degree has been long established, and it is founded on the superior diligence of the creditor in recovering judgment. [His Lordship read sect. 32 of the *Bankruptcy Act*, 1869, and sect. 10 of the *Judicature Act*, 1875, and continued :—] The question is whether, by force of sect. 10, the provision of sect. 32 of the *Bankruptcy Act* that, with the exceptions mentioned in it, all debts shall be paid *pari passu*, is imported into the administration of insolvent estates of deceased persons. This turns upon the construction which is to be given to the words "the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt." If this means that only the bankruptcy rules as to the rights of secured creditors on the one hand, and of unsecured creditors on the other hand, are to apply, then sect. 32 will not apply here, for that section relates to the rights of each class of creditors *inter se*. If, on the other hand, the words mean that the bankruptcy rules which regulate the rights of secured creditors *inter se*, of unsecured creditors *inter se*, and of the class of secured creditors as against the class of unsecured creditors, are to apply, then the provisions of sect. 32 will apply. On the Act alone, independently of authority, I come to the conclusion that the narrower construction must be given to sect. 10, and that it relates only to the rights of secured as against unsecured creditors considered as two conflicting classes of creditors, but that it does not affect the rights of the members of each of the two classes of secured and unsecured creditors *inter se*. A great many of the authorities which have been cited have nothing to do with the question of the distribution of assets, but deal only with the question what are the assets which are to be administered. On the latter point, I find that no change has been introduced by the new law. Thus it has been decided that sect. 87 of the *Bankruptcy Act* and the reputed ownership clause (sect. 15) do not apply to the administration of insolvent estates; that a distress for rent is valid against the assets of a deceased insolvent; that the provisions of the *Bank-*

FRY, J.
1882
In re MAGGI.
WINEHOUSE *v.* WINEHOUSE.

ruptcy Act as to fraudulent preference, and the provisions of the *Bills of Sale Act* as to unregistered bills of sale, do not apply. The goods which were the goods of the dead man at the time of his death are his goods for the purpose of administration, and they only are to be administered. But there are some cases in which the question of the application of sect. 32 of the *Bankruptcy Act* has been raised, and the Court has had to consider whether its provisions are imported by virtue of sect. 10. The authorities stand in a somewhat peculiar position. The present Master of the Rolls in *In re Norton Ironworks Company* (1), and Vice-Chancellor *Malins* in *In re Association of Land Financiers* (2), held that the provisions of sect. 32 for the payment in full of the wages of servants and workmen are imported by sect. 10 into the winding-up of companies, while in *In re Albion Steel and Wire Company* (3) the Master of the Rolls held that the provision for the payment in priority of local rates is not imported into a winding-up. And, again, in *Smith* v. *Morgan* (4), the Common Pleas Division, consisting of Lord *Coleridge* C.J., and Lord Justice (then Mr. Justice) *Lindley*, held that the last clause of sect. 32, which is now in question, is not imported into the administration of the assets of deceased persons. In this conflict of authority it is not easy to say whether I am following or differing from the prior authorities, but I think the weight of authority is in favour of my conclusion that sect. 32 is not introduced into the administration of the estates of deceased persons. I am confirmed in my conclusion by the decision of the Court of Appeal in *Lee* v. *Nuttall* (5), that an executor's right of retainer is not affected by sect. 10. If the effect of that section had been to introduce the rule that, with the exceptions mentioned in sect. 32 of the *Bankruptcy Act*, all debts are to be paid *pari passu*, it is difficult to see how the priority given to an executor by means of his right of retainer could remain. And, moreover, in *In re Withernsea Brickworks* (6), Lord Justice *Lush* and (though perhaps not quite so distinctly) Lord Justice *James*, expressed

(1) 26 W. R. 53.
(2) 16 Ch. D. 373.
(3) 7 Ch. D. 547.
(4) 5 C. P. D. 337; 49 L. J. (Ch.) 410.
(5) 12 Ch. D. 61.
(6) 16 Ch. D. 337.

an opinion that the sole object of this part of sect. 10 was to get rid of the rule which was laid down in the case of *Mason* v. *Bogg* (1), and afterwards extended to the winding-up of companies, that in the administration of the assets a secured creditor who had not realised his security could prove for and receive dividends on the whole amount of his debt, and afterwards realise his security, subject only to this, that he could not retain more than 20*s* in the pound in the whole. In other words, Lord Justice *James* and Lord Justice *Lush* were of opinion that sect. 10 was intended to affect only the rights of secured and unsecured creditors as two conflicting classes. I hold, therefore, that the priority to which the applicant would otherwise have been entitled by virtue of his judgment is not taken away by sect. 10.

The only question then is whether he has lost his priority by reason of delay, and in my judgment he has not. It appears that he was not aware that the testator's estate would be insolvent until January in the present year. I think there has been no unreasonable delay. I hold, therefore, that, notwithstanding the general terms of the order on further consideration, the applicant is entitled to retain the priority given to him by his judgment. He will add his costs to his security.

Solicitor for Applicant: *H. Aird*, agent for *A. J. O'Connor*, *Birmingham.*

Solicitor for Plaintiff: *O. B. Wooler*, agent for *Morgan & Scott*, *Cardiff.*

Solicitors for Executors: *Cunliffe, Beaumont, & Davenport.*

(1) 2 My. & Cr. 443.

W. L. C.

KAY, J.

MIDLAND RAILWAY COMPANY *v.* HAUNCHWOOD BRICK AND TILE COMPANY.

March 17, 18, 20, 22.

[1880 M. 0780.]

Mines—Minerals—Clay—Conveyance—Railway Company—Railways Clauses Consolidation Act, 1845 (8 *Vict. c.* 20), *s.* 77 [*Revised Ed. Statutes, vol. ix. p.* 726].

The word "mines" in the 77th section of the *Railways Clauses Act*, 1845, includes minerals whether got by underground or by open workings; and therefore a bed of clay, on which the railway had been made, was as a mine excepted out of the conveyance of the land to the railway company, and might, unless the company were willing to make compensation to the landowner, be dug and worked by him.

THE *Midland Railway Company* were, by an Act passed in 1861, incorporating the *Railways Clauses Consolidation Act*, 1845, authorised to make a railway which would pass through lands at *Nuneaton* belonging to one *W. S. Dugdale* and his mortgagees. The *Railway Company* gave the usual notices, and by an indenture dated the 9th of July, 1863, the land on which the railway was constructed was conveyed by *W. S. Dugdale* and his mortgagees to the *Railway Company*, the conveyance not containing any reservation or any express grant of mines or minerals. The railway, there, was in a cutting going through a bed of brick and fire-clay. In 1881 the *Haunchwood Brick and Tile Company*, claiming as licensees under *W. S. Dugdale* and his mortgagees, gave notice to the *Railway Company* of their intention to work the clay under the land so conveyed to the *Railway Company*. The *Railway Company* brought this action against the *Brick and Tile Company*, alleging that the purchase-money paid for the land was ascertained under the provisions of the *Lands Clauses Act*, and to the best of their belief included the value of the clay; also that the only proper mode of working the clay was by coming on the surface and so taking it; and claiming an injunction to restrain the *Brick and Tile Company* from entering on the surface of the *Railway Company's* land, and from digging or working the clay in any manner not usual; and from working any clay so as to injure a bridge which had been built by the *Railway Company*.

The *Brick and Tile Company* denied that the clay could only be worked from the surface, and denied that the value of the clay, which was many thousands of pounds, was included in the price given for the land, which was about £100 an acre.

Each of the parties produced evidence in support of their respective allegations; but the case was mainly decided on the question whether under the 77th clause of the *Railways Clauses Act* (1) clay was included under the word "mines," so as to be excepted from the conveyance to the *Railway Company*.

Davey, Q.C., *Gifford*, Q.C., and *P. Beale*, for the *Railway Company*:—

There is no reservation in the conveyance, and it is for the Defendants to shew that the clay did not pass. The only word in the Act is "mines," and that does not include clay. In no decided case has anything not a mine in the ordinary sense of the word been held to be excepted. The railway actually rests on the clay, and if that does not belong to the *Railway Company* what does belong to them, and what did pass by the conveyance? Bricks may be made of almost any earth, and the railway companies might be obliged, in fact, to buy their land many times over.

The word "mine," does not include an open cutting: *Bell* v. *Wilson* (2); *Attorney-General for Isle of Man* v. *Mylchreest* (3); *Midland Railway Company* v. *Checkley* (4); *Hext* v. *Gill* (5); *Dixon* v. *Caledonian and Glasgow Railway Companies* (6); *Great Western Railway Company* v. *Bennett* (7), decides that a railway company is not obliged to take a mine which may never become dangerous, but the surface of the land can never be worked without destroying the railway. If the clay could be got by under-

(1) 8 Vict. c. 20, s. 77: "The company shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the works, unless the same shall have been expressly purchased; and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands unless they shall have been expressly named therein and conveyed thereby."

(2) Law Rep. 1 Ch. 303.

(3) 4 App. Cas. 294.

(4) Law Rep. 4 Eq. 19.

(5) Law Rep. 7 Ch. 699.

(6) 5 App. Cas. 820.

(7) Law Rep. 2 H. L. 27.

KAY, J.
1882
MIDLAND RAILWAY CO. v. HAUNCHWOOD BRICK AND TILE COMPANY.

ground working it might be included in the word "mine," but this clay cannot, or at all events clay in that district never has been, got in that way. Even if the railway ran through coal at the surface, and the company had bought and paid for the land, the coal on which the railway stands must be included in their purchase: *Rex* v. *Inhabitants of Sedgley* (1); *Rex* v. *Brettell* (2); *Darvill* v. *Roper* (3).

Rigby, Q.C., and *Ingle Joyce*, for the *Brick and Tile Company*:—

The word "minerals" certainly includes clay, and mines as here used is synonymous. The price shews that this valuable clay was not intended to be sold. This provision of the Act is for the benefit of the railway companies, in order that they should not be obliged to pay for minerals which might never be worked. But when they are worked they are to be paid for, and unless minerals are expressly included in the conveyance they do not pass. It seems to be admitted that the clay might be worked underground, and yet the damage to the railway would be as great. *London and North Western Railway Company* v. *Ackroyd* (4) does not apply. The company bought the right to make the railway and to use the clay as a support until it was wanted: *Errington* v. *Metropolitan District Railway Company* (5). If the contrary view is adopted, the companies will have to pay for all the minerals under the land whenever they buy a piece of land, and there must in each case be an inquiry as to the possible value of the minerals.

Giffard, in reply:—

It has never been decided what the word "mines" in the Act means, and the usual meaning is what is worked underground. When a railway passes through a tunnel surely the minerals above it are included. It is not true that all minerals are excepted, for such as are dug in the course of the railway are not. A landowner cannot, after having been paid for his land, have a right to destroy the railway which stands upon it.

(1) 2 B. & Ad. 65.
(2) 3 B. & Ad. 424.
(3) 3 Drew. 294.
(4) 31 L. J. (Ch.) 588.
(5) 19 Ch. D. 559.

March 22. KAY, J.:—

KAY, J.

1882

MIDLAND RAILWAY CO. v. HAUNCHWOOD BRICK AND TILE COMPANY.

The question in this case is as to the meaning of the word "mines" in the 77th and following sections of the *Railways Clauses Act* of 1845. The primary meaning of the word "mine" standing alone is an underground excavation made for the purpose of getting minerals, as in *Bell* v. *Wilson* (1). In leases and similar documents it is commonly used in a slightly different sense. For instance, "All that mine, vein, or seam of coal, &c." There the word includes the stratum of the minerals as well as the excavation made to win it. "Minerals," on the other hand, means primarily all substances (other than the agricultural surface of the ground) which may be got for manufacturing or mercantile purposes, whether from a mine, as the word would seem to signify, or such as stone or clay, which are got by open working, as decided in *Midland Railway Company* v. *Checkley* (2); *Earl of Rosse* v. *Wainman* (3); *Hext* v. *Gill* (4). The particular signification of each of these words may be varied largely by the context.

The group of sections in the *Railways Clauses Act* which have to be construed is prefaced by the words "And with respect to mines lying under or near the railway be it enacted as follows." Sect. 77 provides that the company shall not be entitled to any mines of coal, ironstone, slate, or other minerals, under any land purchased by them. Stopping there, those words are susceptible of two meanings. They may mean that the company shall not be entitled to any mines of coal, mines of ironstone, mines of slate, or mines of other minerals; or they may mean that the company shall not be entitled to any mines of coal or to any ironstone or to any slate, or to any other minerals, confining the word "mine" to coal, and using it as meaning both the coal and the workings. The next words, "except only such parts thereof as shall be necessary to be dug or carried away, or used in the construction of the works," put it beyond doubt, whichever of these two interpretations be adopted, that "mines" does not mean merely underground excavation, but certainly includes some minerals, and these words also shew that the minerals intended

(1) Law Rep. 1 Ch. 303.
(2) Law Rep. 4 Eq. 19.
(3) 14 M. & W. 859.
(4) Law Rep. 7 Ch, 699.

KAY, J.
1882
MIDLAND RAILWAY CO. v. HAUNCHWOOD BRICK AND TILE COMPANY.

are such as, in the making of the railway, it may be necessary to dig or carry away, and therefore they are minerals that might not lie very deep, and further, such as may be used in the construction of the works, which seems to signify substances like stone, which may be used without being dug, or possibly which may be dug and used as distinguished from carried away, as clay, which may be made into bricks or stone, and so used for building bridges or other structures. Then follow the words "unless the same shall have been expressly purchased," clearly giving the company power, if they think fit, to purchase the minerals, whatever they are, at the time when they buy the rest of the land, as was recently decided in *Errington* v. *Metropolitan District Railway Company* (1). And last come the words "And all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands unless they shall have been expressly named therein and conveyed thereby."

There we have again the word "mines" alone used to describe all that is mentioned in the former part of the section. Now, beyond question mines in that section, taking it altogether, does not mean merely underground excavations for the purpose of getting minerals. The word as there used certainly includes minerals, and the question is narrowed to this, Does it mean only minerals which are got by mining—that is, by underground workings—or does it include such as are got by open workings also? Is the general purport of the section restricted by the use of the word "mines," or is the meaning of that word enlarged by the context? The provision is one which, as Lord *Chelmsford* said in *Great Western Railway Company* v. *Bennett* (2), is evidently intended for the benefit of railway companies. It relieves them from the necessity of purchasing costly minerals when they buy the land, and the sections that follow empower them to prevent any damage being done to the line afterwards by the working of these unpurchased minerals. There is no reason, therefore, for putting a narrow and restricted construction upon the word "mines." As I have pointed out, it clearly includes not only such minerals as may be dug and carried away, but such as may be used in the construction of the works, which can hardly be confined to minerals

(1) 19 Ch. D. 559. (2) Law Rep. 2 H. L. 27.

which could only be got by mining. But it is legitimate and necessary to look at the succeeding sections to see if they contain anything to make the meaning more clear. Section 78 provides that notice shall be given by the owner of his intention to work, and the words there used are, "any mines or minerals lying under the railway or any of the works connected therewith," or within forty yards therefrom. On receipt of such notice, the company may cause "such mines" to be inspected, and if "the working of such mines or minerals" is likely to damage the line, it may be prevented "if the company be willing to make compensation for such mines." In that section the word "mines," which was before used to include the minerals in a mine, is contrasted with the word "minerals," which, therefore, according to reasonable construction must mean something other than minerals got from mines—that is minerals from open workings; if not, a clay pit or quarry might be worked in land not purchased within forty yards of the abutment of a bridge or viaduct, so as to endanger the whole structure, and the company would have no right even to cause such a working to be inspected unless it was included in the word "mines." But the last words which I have referred to are most material. "If it appear to the company that the working of such mines or minerals is likely to damage the works of the railway, and if the company be willing to make compensation for such mines or any part thereof," the owner thereof shall not work or get the same. "Such mines" is there used as equivalent to "mines or minerals." The words "the working of such mines or minerals" shew that, in that sentence, mines does not mean an excavation only, but includes the minerals thereby got. The words "or minerals" must, therefore, mean minerals got otherwise than by mining, and the sentence providing for compensation for "such mines," shews that "mines" is used to mean the same "as mines or minerals," and the section prohibiting the owner from working points to the same conclusion, because "working" applies to a mine, but "getting" more properly refers to minerals. In section 79, "the said mines," "such mines," "such mines or minerals," are used apparently as phrases having the same signification. Section 83 gives power to the company after twenty-four hours' notice to enter upon any lands in which any "such mines" are being worked, to inspect the same, and unless

KAY, J.
1882
MIDLAND RAILWAY CO. v. HAUNCHWOOD BRICK AND TILE COMPANY.

"such mines" include open workings, it would not enable them to enter on land to inspect a quarry or clay pit. The grammatical construction, therefore, rather favours the larger signification of the word "mines," making it include not only minerals got by mining, but also by open workings.

Then it is necessary to consider what may be the more probable intention. It is urged on the one hand that the intention was to compel railway companies at once to purchase surface minerals, and only to give them this option to postpone purchase as to mines properly so-called; on the other hand, the option may be intended to include surface minerals, which, like a bed of china clay, are sometimes of great value, but are not likely to be worked for some time. It is also argued that there are always some surface minerals that are merchantable, and that the latter construction might cause great expense and inconvenience to companies, and might subject them to receive notice of intended quarrying all along their lines; but this objection would also apply to mines properly so-called. Minerals really merchantable not lying in mines are not so generally to be found as that argument supposes; and if it appeared that any notice of an intention to work was not *bonâ fide*, the Court would have ample power to deal with such a case. The counter argument is that the object being to relieve the company from outlay in the first instance, this is better effected by adopting the larger meaning of the word "mines," and a few words in the original conveyance, if the parties desire it, may pass the surface minerals with the land.

But this group of sections is prefaced by the words "And with respect to mines lying under or near the railway." This, as was held in *Great Western Railway Company* v. *Bennett* (1), renders inapplicable the cases of *Caledonian Railway Company* v. *Sprot* (2) and *Elliot* v. *North Eastern Railway Company* (3). And unless these sections apply to minerals which may be worked by open workings within forty yards of the railway, the company would have no power to inspect such workings or to purchase them, or to prevent the owner from working them, though doing so might destroy the railway. This cannot be intended.

With respect to authority, there seems to be no English case in

(1) Law Rep. 2 H. L. 27. (2) 2 Macq. 449.
(3) 10 H. L. C. 333.

which this question has been decided. In *Great Western Railway Company* v. *Bennett* (1), Lord *Chelmsford* says, "The provision contained in this section is extremely beneficial to railway companies. They are not to have any mines or minerals, that is (any part of the mines or minerals) under the land purchased by them; but they may secure sufficient support to the railway by purchasing it from the owner of the mines, or, if they think it likely that the mines under the railway may not be worked for an indefinite period they may postpone the purchase until the necessity for it arises. That this section reserves to the mine-owner all the minerals however near they may be to the surface, unless the company choose to purchase them, appears very clearly from the exception of 'the parts necessary to be dug or carried away, or used in the construction of the company's works,' as these will of course be the minerals lying nearest to the surface." Lord *Cranworth*, said (2): "It was obviously the intention of the Legislature in making these provisions to create a new code as to the relation between mine-owners and railway companies, where lands were compulsorily taken for the purpose of making a railway. The object of the statute evidently was to get rid of all the ordinary law on the subject, and to compel the owner to sell the surface, and if any mines were so near the surface that they must be taken for the purposes of the railway, to compel him to sell them; but not to compel him to sell anything more. The land was to be dealt with just as if there were no mines to be considered; nothing but the surface." Lord *Westbury* said, referring to the 77th section (3), "In the face of these words, there is no room for the ordinary implication which applies to a common grant, namely, that it extends by implication to all that, though not named, which is necessary for the support or enjoyment of the thing granted." He then refers to the notice, and says, "If the company should not think it requisite, the mine-owner is left under no other obligation than that he is to win the mines in a proper manner."

In *Great Western Railway Company* v. *Fletcher* (4), *Cockburn*, C.J., said: "Now, what the Act of Parliament means is

(1) Law Rep. 2 H. L. 38.
(2) Ibid. 40.
(3) Law Rep. 2 H. L. 41.
(4) 5 H. & N. 689, 698.

KAY, J.
1882
MIDLAND RAILWAY CO. v. HAUNCHWOOD BRICK AND TILE COMPANY.

this. All that the railway company requires is the surface soil; it may be that the minerals will never be worked by the landowner, in which case the company ought not to be subject to any expense: and therefore the Legislature interposes and says that the company shall be under no obligation to pay the landowner for that which may never be required; but if the mines come to be worked, and the company require them as necessary for the support of the surface, they must make compensation to the landowner." This language certainly favours the construction which appears to me the more probable; the point, however, was not essential to the decision in that case.

But in a Scotch case of *Jamieson* v. *North British Railway Company* (1) the very question was decided by Lord Ordinary *Kinloch*, on the Scotch *Railways Clauses Act*, which is for this purpose identical with the English Act. It was there determined that freestone worked by an open quarry was within the reservation; and in another Scotch case of *Dixon* v. *Caledonian and Glasgow Railway Companies* (2) the Lord Ordinary *Adam* arrived at a similar conclusion as to a limestone quarry worked by open workings, which was in no sense a mine.

The subject of litigation in this case is a bed of clay used for making a peculiar kind of brick, and of some value, from the circumstance that it contains a certain amount of iron. There are three or four feet of surface earth above this, except at one point where it crops out, but it is in no sense a mine, being got entirely by open workings. The railway has been made in a cutting which is in the bed of clay itself, so that the ballast, sleepers, and rails are laid upon the clay. I must take it that notice has been given by the Defendants of their intention to work, and no counter-notice by the Plaintiffs. It is argued that even if the clay be reserved, yet the owners cannot work it because, according to these provisions, particularly sect. 79, they can only employ the usual mode, and that being by open workings, they must dig from the surface of the line, and this would be a trespass. But this seems to me an ingenious distortion of the provision, which is clearly intended in the company's favour, in case a mine is worked under or near the line, to prevent

(1) 6 Scot. Law Rep. 188. (2) 5 App. Cas. 820.

unnecessary excavation, which might cause more risk or damage than the usual mode of working. It cannot mean that the owner of a bed of clay shall only work it by trespassing, so as to enable the company to prevent him from working it at all. It is clear that the clay may be got and the railway destroyed by working from the side and excavating without going upon the railway at all; and, as letting down the surface is, according to *Great Western Railway Company* v. *Bennett* (1), not a trespass or wrong, I do not think, if the clay is reserved, that the company would be entitled to an injunction, on this ground, to prevent the working. According to *Dixon* v. *Caledonian and Glasgow Railway Companies* (2) the company can give a counter-notice and have the value of the clay assessed, and by paying for it can prevent the owner from working. It was also argued, but not very confidently, that the Defendants are not owners, lessees, or occupiers within the statute, because they have only a licence to work under the railway; but by this licence they have the right of occupation, and are owners of all minerals which they can get. I do not think that this objection can avail. I must therefore refuse to grant any injunction, and dismiss the action, with costs.

Solicitors for Plaintiffs: *Beale, Marigold, & Co.*

Solicitor for Defendants: *F. Needham*, for *E. & A. Caddick, West Bromwich.*

(1) Law Rep. 2 H. L. 27.

(2) 5 App. Cas. 820.

C. M.

C. A. 1881 KAY, J. *Nov.* 28, 29; *Dec.* 2. C. A. 1882 *March* 6.

LONDON AND SOUTH WESTERN RAILWAY COMPANY *v.* GOMM.

[1880 L. 2295.]

Railway Company—Sale of Superfluous Land—Lands Clauses Consolidation Act, 1845 (8 *Vict. c.* 18), *s.* 127 [*Revised Ed. Statutes, vol. ix. p.* 660]—*Covenant to reconvey—Ultrà Vires—Perpetuity—Land required for Purposes of Railway.*

By a deed dated in August, 1865, which recited that the Plaintiff company were seised in fee simple of certain land which was no longer required for the purposes of their railway, the company conveyed the land to *G. P.* in fee for £100, and *G. P.* covenanted with the company that he, his heirs or assigns, would at any time thereafter whenever the land might be required for the railway or works of the company, and whenever thereunto requested by the company on a six calendar months' notice, and upon receiving £100, reconvey the land to the company. In 1879 the Defendant purchased the land from *G. P.'s* heir, with notice of the above covenant. In 1880 the company gave the Defendant notice to reconvey the land, and upon his refusal to do so this action was brought for specific performance of the covenant. The company had power in 1865 by their special Act to purchase land by agreement, though not compulsorily, and that power was extended to the present time by subsequent Acts:—

Held, by *Kay*, J., that the transaction of 1865 was not *ultrà vires* the company, that as there was at that time a strong probability that the land would be required for the purposes of the company, it was within their power to enter into a prospective contract to purchase it, and that the sale was not a conditional sale, but an absolute sale with a personal contract by the purchaser to resell.

Held, also, by *Kay*, J., that an executory interest in property to arise on a future event which may not happen within the limits of the rule against perpetuities is void, though it be limited to an ascertained person who can release it at any time.

The dictum in *Gilbertson* v. *Richards* (1) and the decision in *Birmingham Canal Company* v. *Cartwright* (2) dissented from.

But, *held*, by *Kay*, J., that in the present case the covenant did not create any estate or interest in land, and therefore was not obnoxious to the rule against perpetuities, and that specific performance must be decreed, the covenant being binding on an alienee with notice on the principle of *Tulk* v. *Moxhay* (3).

Held, by the Court of Appeal, that the covenant in the deed of 1865 reserved to the company an interest in the land, and that the sale was *ultrà*

(1) 4 H. & N. 277, 297. (2) 11 Ch. D. 421.
(3) 2 Ph. 774.

vires and void, for that under the *Lands Clauses Consolidation Act*, 1845, s. 127, land sold by a company as superfluous land must be sold absolutely without reserving any interest to the company:

Held, also, that as the covenant gave to the company an executory interest in land to arise on an event which might occur after the period allowed by the rules as to remoteness, it was invalid on the ground of remoteness.

Birmingham Canal Company v. *Cartwright* (1) overruled.

The doctrine of *Tulk* v. *Moxhay* (2) only applies to restrictive covenants and not to covenants to do acts relating to the land.

BY an indenture, dated the 10th of August, 1865, made between the Plaintiffs, the *London and South Western Railway Company*, of the one part, and *George Powell* of the other part, after reciting that the Plaintiffs were seised of the fee simple and inheritance of the piece or parcel of land and hereditaments intended to be thereby conveyed, "which being no longer required for the purposes of their railway," they had contracted to sell to the said *George Powell* (who was the adjoining owner thereto) at the sum of £100, subject to the conditions thereinafter contained, the company conveyed to *Powell* in fee the piece of land in question being a small piece of land situate near their *Brentford Station*. And *Powell* thereby, for himself, his heirs, executors, administrators, and assigns, covenanted with the Plaintiffs, their successors and assigns, that he, the said *G. Powell*, his heirs and assigns, owner and owners for the time being of the hereditaments intended to be thereby conveyed, and all other persons who should or might be interested therein, should and would at any time thereafter (whenever the said land might be required for the railway or works of the company) whenever thereunto requested by the company, their successors or assigns, by a six calendar months' previous notice in writing, to be left as therein mentioned, and upon receiving from the company, their successors or assigns, the said sum of £100 without interest, make and execute to the company, their successors and assigns, at the expense of the company, a reconveyance of the said hereditaments free from any incumbrances created by the said *G. Powell*, his heirs or assigns, or any persons claiming under or in trust for him or them.

The ten years limited by the 127th section of the *Lands Clauses Consolidation Act*, 1845, had expired in 1862, but the company

(1) 11 Ch. D. 421. (2) 2 Ph. 774.

C. A. 1882

LONDON AND SOUTH WESTERN RAILWAY CO. v. GOMM.

had still power of purchasing land in this neighbourhood by agreement.

The premises comprised in the above indenture were in the year 1879 sold and conveyed along with other property, by the son of *George Powell* to the defendant, who had full notice of the provisions of the deed of August, 1865. Uninterrupted possession of the land had been had by *George Powell* and his successors in title ever since the purchase in 1865.

On the 12th of March, 1880, the company gave notice in writing to the defendant claiming to repurchase the property under the provision in the deed of August, 1865. The defendant refused to reconvey, upon which the company commenced their action, alleging that the land in question was required for the purposes of their undertaking, and for the improvement of their railway and works, and claimed specific performance of the covenant in the deed of 1865.

The Defendant by his defence alleged that he had purchased this land in the year 1879 after the death of *G. Powell*, and long after the period limited by the *Lands Clauses Consolidation Act* and other Acts under which the Plaintiffs were incorporated for the absolute sale and disposal by them of all superfluous lands had expired, and that all estate and interest of the Plaintiffs in the said lands had become vested in the adjoining owner when the Defendant so purchased. That the condition or covenant in the deed of August 1865, if and so far as the same purported to bind the land in the hands of succeeding owners, or to bind succeeding owners, was invalid, but if valid had ceased, and was at an end before the Defendant purchased.

At the time when the company gave their notice to purchase this land from the Defendant they had no compulsory power of purchasing land in that neighbourhood, but under the *London and South Western Railway Act*, 1863 (26 & 27 Vict. c. xc.), s. 94, and the *London and South Western Railway* (*General*) *Act*, 1868 (31 & 32 Vict. c. lxix.), s. 23, and others of their Acts, they still had power to purchase lands by agreement, under which this land might have been purchased if the Defendant had been willing to sell it.

The action now came on for trial, and several engineers of the

Plaintiffs were examined as witnesses, who proved that the land in question was now required by the company for the purpose of extending the works connected with the station at *Brentford*, and, further, that in the year 1865, when the land was conveyed to *G. Powell*, there was a great probability that at some future period it would be so required.

The action came on to be heard before Mr. Justice *Kay* on the 28th of November, 1881.

Rigby, Q.C., and *Gaselee*, for the Plaintiffs:—

When this piece of land was conveyed by the company in 1865 to *G. Powell* it was recited that it was no longer required for the purposes of the railway, nor was it required at that time; but there was then a great probability that it would be required, and we shew by the evidence of our engineers that that was so, and that it is at the present time required for the enlargement of the station works in order to meet the increased traffic on the line. The evidence of the company's engineers is sufficient for this purpose: *Kemp* v. *South Eastern Railway Company* (1). The conveyance was made to meet this necessity. The land was not sold as superfluous land, but as land not then required, and it was a sale out and out, with a covenant on the part of the purchaser to reconvey whenever the company should give notice to that effect to the purchaser. The title of the company is shewn by the recital that they are seised in fee simple of the land. We had at the time of the conveyance a parliamentary power to purchase under our special Acts of 1863 and 1868, and that power is still existing. If we had no power to purchase, then the conveyance would be void, and we should be entitled to enter into possession again upon repayment of the money we received; but we contend that we had power to effect this purchase, and that the land did not come within the definition of superfluous land. It was held in *Hooper* v. *Bourne* (2) that where lands had been taken compulsorily under the powers of a Railway Act and retained by the company with the *bonâ fide* intention of using them for the purposes of the railway, and at the expiration of the period for the sale of superfluous lands, though they were not in actual use,

(1) Law Rep. 7 Ch. 364. (2) 2 Q. B. D. 339.

C. A. 1882 — LONDON AND SOUTH WESTERN RAILWAY CO. v. GOMM.

there was a reasonable prospect of their being ultimately required for the purposes of the railway, such lands were not superfluous lands within sect. 127 of the *Lands Clauses Consolidation Act*. That case was affirmed on appeal (1), and Lord Justice *Bramwell* then said that in his opinion land was required by a company not only where it was actually wanted for the laying down of the rails and erecting works, but also where, although it was not at the moment used by the company, it would be wanted within a definite and ascertained time. The Defendant also alleges that the covenant by the purchaser to reconvey at any time upon notice to that effect being given by the company, is void as tending to a perpetuity, but this question is settled by the case of *Birmingham Canal Company* v. *Cartwright* (2), in which it was held that a similar covenant was not obnoxious to the rule against perpetuities; and that case was decided upon the authority of *Gilbertson* v. *Richards* (3).

Whitehorne, Q.C., and *Vaughan Hawkins*, for the Defendant:—

The first question is, whether this is superfluous land within the meaning of the 127th section of the *Lands Clauses Consolidation, Act*, 1845. We say that after it ceased to be required for the purposes of the railway it became superfluous land, and as such it was the duty of the company to sell it, and if not sold it vested in the adjoining owner. This land was not required for the purposes of the railway; that is so stated in the conveyance. The question as to its being superfluous must be settled within ten years. This point was decided in *Great Western Railway Company* v. *May* (4). There it was held that where at the end of ten years the directors had allowed persons to occupy portions, retaining a right of re-entry, still an adjoining owner could claim the land, on the ground that it had become "superfluous land." It must be settled, therefore, within the ten years whether or not it is superfluous, and after that period all the liabilities as to such land attach. This conveyance to *G. Powell* was a device to enable the company to avoid selling absolutely, and therefore to evade

(1) 3 Q. B. D. 258.
(2) 11 Ch. D. 421.
(3) 4 H. & N. 277.
(4) Law Rep. 7 H. L. 283.

the Act. All the authorities turn on the question whether or not the land was superfluous, such as *Hooper* v. *Bourne* (1).

Then it is said we are estopped by reason of our covenant to reconvey, but there is no authority for saying that a covenant will create an estoppel, and the Master of the Rolls in the case of *General Finance, Mortgage, and Discount Company* v. *Liberator Permanent Benefit Building Society* (2) said there was no authority in all the long line of cases which made a covenant sufficient to create an estoppel.

The railway company by the conveyance they have made have endeavoured to contract themselves out of the law. A railway company have no power to alienate any land they have purchased except superfluous land, and if they have power to sell at all it is only to sell absolutely under the 127th section: *Mulliner* v. *Midland Railway Company* (3); *In re Metropolitan District Railway Company and Cosh* (4); *London and South Western Railway Company* v. *Blackmore* (5). Moreover this is a right for the company at any time to acquire land, and that is illegal. A railway company has no power to purchase and hold lands, except under the powers expressly given them for that purpose.

Then we say that such a covenant as this is unknown to the English law. It is a covenant giving a right to purchase at any time, which cannot be enforced, because it is contrary to the rule against perpetuities. The Railway Act gives the company power to purchase land for their railway within a specified time, after which they have no longer a right to purchase. The deed recites that the land is no longer required, that means superfluous land, how then can they give themselves a power to purchase which is not given them by the Act? The Act gives the company no power to say "we do not now want the land, but as we may want it at a future time we will keep it open and purchase it hereafter." But suppose it were two separate transactions, that is a sale out and out to the purchaser with a covenant by the purchaser to sell again, then we say that is not the way in which the Legislature has enabled the company to purchase. The right of a company

(1) 5 App. Cas. 1.
(2) 10 Ch. D. 15.
(3) 11 Ch. D. 611.
(4) 13 Ch. D. 607.
(5) Law Rep. 4 H. L. 610.

C. A. 1882 — LONDON AND SOUTH WESTERN RAILWAY CO. v. GOMM.

to purchase land has always been limited within the law of perpetuities, and there is no case in which a person has been held capable of contracting himself out of a perpetuity. You cannot bind the land against any one else. The case of a legal easement over land is different from this, where there is a covenant to pass the fee simple bodily over. Such a covenant is only void when it seeks to bind the land.

[They also cited on the question of perpetuities: *Avern* v. *Lloyd* (1) the decision in which was questioned by Vice-Chancellor *Malins* in *Stuart* v. *Cockerell* (2) and *In re Brown and Sibly's Contract* (3); *Joshua Williams* on Settlements (4); Lord *St. Leonards* on Powers (5); *Lewis* on Perpetuity (6); *Jarman* on Wills (7).

Rigby, in reply, as to the infringement of the law against perpetuities:—

This is a question of the law of contracts as administered in a Court of Equity and does not affect the land. If a man purchases with a restrictive covenant, no subsequent purchaser with notice of the restriction can violate it. The Defendant in this case purchased with knowledge of the restriction—that he must resell it to the antecedent owner of the land, and he cannot afterwards repudiate the bargain. This has nothing to do with the law against perpetuities. This contract does not bind the land, but it binds any one who takes the land with knowledge of the contract. I contend that *Powell*, for valuable consideration, entered into a bargain for the purchase of the land, and the Defendant *Gomm*, through him, is bound by the same bargain. In *De Mattos* v. *Gibson* (8), which is an authority in support of our argument, Lord Justice *Knight Bruce* said, where property is contracted to be used in a particular manner, and a purchaser buys that property with notice of that contract, he is bound not to use it otherwise than under the contract. So also in the well-known case of *Tulk* v. *Moxhay* (9), with reference to the garden in *Leicester Square*,

(1) Law Rep. 5 Eq. 383.
(2) Law Rep. 7 Eq. 363.
(3) 3 Ch. D. 156.
(4) Page 32.
(5) 8th Ed. p. 16.
(6) Page 164.
(7) 4th Ed. p. 281.
(8) 4 De G. & J. 276.
(9) 2 Ph. 774.

the law of perpetuities could not prevail so as to enable the purchaser of the land to escape from fulfilling the covenant entered into by his vendor to keep the square in good repair and free from buildings. This contract does not bind the land, but it binds any one who purchases it with notice of the restriction.

1881. Dec. 2. KAY, J., after stating the effect of the deed of the 10th of August, 1865, continued:—

The Defendant is an assignee of *Powell* with notice of the covenant. On the 12th of March, 1880, notice was given that the railway company required the land. The Defendant refusing to convey, this action was commenced on the 22nd of November, 1880, for specific performance of the covenant.

In opposition to the claim it is insisted:—

1. That the arrangement was *ultrà vires* and void.

2. That the covenant to reconvey is void as tending to a perpetuity.

3. That the land is not required for the purposes of the railway.

On the last point I am satisfied by the evidence of the company's engineers, which according to *Stockton and Darlington Railway Company* v. *Brown* (1) and *Kemp* v. *South Eastern Railway Company* (2), is conclusive, that the land is *bonâ fide* required for purposes within sect. 45 of the *Railways Clauses Consolidation Act*.

By their special Act of 1863, the company had in 1865 power to purchase this land for such purposes, and that power still exists under an Act obtained by them in 1868.

But it is argued that this was in 1865 superfluous land, and ought then to have been sold absolutely to *Powell* as the adjoining owner, and that this being a conditional sale was void. I am satisfied by the evidence that though not wanted at the time there was in 1865 a strong probability that this land, which immediately adjoins the company's station at *Brentford*, would be required eventually, and therefore a prospective contract to purchase was I think within the powers of the company: *Kemp* v.

(1) 9 H. L. C. 246. (2) Law Rep. 7 Ch. 364.

C. A. 1882 — LONDON AND SOUTH WESTERN RAILWAY CO. v. GOMM. — Kay, J.

South Eastern Railway Company (1); *Hooper* v. *Bourne* (2). And it seems to me that the true effect of the transaction in 1865 was not a conditional sale, but a sale out and out to *Powell*, with a personal contract by him to reconvey when called on at a certain price. Probably the price he had to pay was considerably less by reason of this covenant, and if the transaction was *ultrà vires*, the proper thing to do would be to set the sale aside altogether, in which case the land ought to be reconveyed on payment back of the purchase-money. But I do not think it was a transaction beyond the powers of the company.

The remaining question is, whether this covenant is void as tending to a perpetuity.

Upon this branch of the argument two cases were referred to. The first of these is *Gilbertson* v. *Richards* (3).

In that case one *Billings*, being entitled to the fee simple of certain lands, agreed to sell them subject to the payment by the purchaser to him of £40 a year, for which he was to have a power of distress. Then he and the purchaser mortgaged the property by a deed which contained a proviso that if the mortgagee, or any one claiming under him, should ever enter into possession the premises should thenceforth be charged with the payment to *Billings*, his heirs and assigns, of the annual sum of £40. It was argued that this was void for remoteness. That argument was answered by Baron *Martin* (4) thus: "The second objection was that it was void for remoteness; that it was to arise at any time, however distant, when the parties of the fourth part, or their heirs, might enter into the land, and therefore might arise long after the time prescribed by law against perpetuity. It is quite true that no rent can be lawfully created which violates the law against remoteness, and therefore a rent could not be granted to the son of an unborn son. But it seems to be an error to call this rent a perpetuity in an illegal sense. It is vested in *Thomas Billings* and his heirs. He or his heirs may sell it or release it at their pleasure. A rent in fee simple may be granted to a man and heirs to continue for ever. Why, therefore, may not one be granted to commence at any time, however remote? It is only a

(1) Law Rep. 7 Ch. 364.
(2) 5 App. Cas. 1.
(3) 4 H. & N. 277; 5 H. & N. 453.
(4) 4 H. & N. 297.

part of the estate in fee simple of the rent. A perpetuity arises when a rent is granted to a person who may not be *in esse* until after the line of perpetuity be passed, but when the estate in the rent is vested in an existing person and his heirs in fee simple, who may deal with it at his or their pleasure and as he or they think fit, we think it is not subject to the objection of remoteness, notwithstanding that its actual enjoyment may depend upon a contingency which may never happen, or may happen at any time however distant. For these reasons we think the rent was well created, and that the distress for it was lawful." In the Exchequer Chamber the same objection having been pressed, was thus answered by Mr. Justice *Wightman*, who delivered the judgment of the Court (1): "The only question which remained for consideration was whether the second objection, founded on the law against perpetuities, was available in this case, and we are of opinion that it is not. We think that this rent is not liable to the objection as to perpetuity. The real effect of the limitations in the deed before us is, that the mortgagees are to take possession or sell, subject to the payment of this rent to *Billings*. It is a restriction on the amount of the estate of the mortgagees, and seems within the cases as to the power of sale in a mortgagee which, as incidental to his estate, is held not to be within the rule as to perpetuities. There may be considerable doubt also on the point raised by counsel, whether the rule as to perpetuities applies to a case like the present, where the party who or whose heirs are to take, is ascertained, and who can dispose of, release, or alienate the estate either at common law, or at all events, since the passing of the 8 & 9 Vict. c. 106, s. 6."

The section of the Act referred to is that which enables a contingent executory and a future right and a possibility coupled with an interest in any hereditaments, whether the object be ascertained or not, to be disposed of by deed. Before that Act such interest could be released when the person contingently entitled was ascertained.

Lord *St. Leonards*, in the 8th edition of his treatise on Powers, at page 16, thus comments on that decision. He cites the language of Baron *Martin* thus: "A rent in fee simple, the Court said,

(1) 5 H. & N. 458.

C. A. 1882 — LONDON AND SOUTH WESTERN RAILWAY CO. v. GOMM. — Kay, J.

may be granted to a man and his heirs to continue for ever. Why therefore may not one be granted to commence at any time however remote? It is only a part of the estate in fee simple of the rent. A perpetuity arises when a rent is granted to a person who may not be *in esse* until after the line of perpetuity be passed; but when the estate in the rent is vested in an existing person, and his heirs in fee simple, who may deal with it at his or their pleasure, it is not subject to the objection of remoteness, notwithstanding that its actual enjoyment may depend upon a contingency which may never happen, or may happen at any time, however distant. This," said Lord *St. Leonards*, "is an important distinction in the law of perpetuity, but it was not necessary for the decision of the case. No perpetuity was created by the power of sale in the mortgagees or by the right of them or their heirs to take possession of the land, but in exercising that right they took, subject to a perpetual rent of £40 a year in favour of the mortgagor. It was a charge on the estate and had no tendency to a perpetuity."

From this it seems to me that Lord *St. Leonards* did not agree with the reason for the decision, but thought it could be supported upon the ground that the exercise of the powers of sale and entry by a mortgagee not being obnoxious to the rule against perpetuities, neither could a condition appended to the exercise of these powers be so.

The *dictum* at the end of the judgment in the Exchequer Chamber he does not seem to notice.

The other case cited to me is *Birmingham Canal Company* v. *Cartwright* (1). There a right of pre-emption, unlimited in point of time, was contracted to be given. The learned Judge in that case cited the passages from the judgments in *Gilbertson* v. *Richards* (2), which I have referred to, and stated his own opinion thus (3): "The next question arises upon the terms of the covenant giving the right of pre-emption—whether or not that right is obnoxious to the rule against perpetuities. In my opinion the covenant is not in any way liable to that objection. I think that wherever a right or interest is presently vested in *A.* and his

(1) 11 Ch. D. 421. (2) 4 H. & N. 277.
(3) 11 Ch. D. 432.

heirs, although the right may not arise until the happening of some contingency which may not take effect within the period defined by the rule against perpetuities, such right or interest is not obnoxious to that rule, and for this reason. The rule is aimed at preventing the suspension of the power of dealing with property—the alienation of land or other property. But, when there is a present right of that sort, although its exercise may be dependent upon a future contingency, and the right is vested in an ascertained person or persons, that person or persons, concurring with the person who is subject to the right, can make a perfectly good title to the property. The total interest in the land, so to speak, is divided between the covenantor and the covenantee, and they can together at any time alienate the land absolutely. I think that *Gilbertson* v. *Richards* (1) is a distinct authority in favour of that conclusion."

I need not say that after quoting such authorities I should distrust my own judgment where it differs from them if I did not find ample authority to support me. But I am unable to agree with these dicta. In my opinion a present right to an interest in property which may arise at a period beyond the legal limit is void notwithstanding that the person entitled to it may release it.

It would be a great extension of the power of tying up property to hold otherwise. If the owner in fee of an estate, or the absolute owner of any property could be fettered from disposing of it by a springing use or executory devise or future contingent interest which might not arise till after the period allowed by the rule, it would be easy to tie up property for a very long time indeed. The present interest under the executory limitations might be vested in an infant, a lunatic, or in a person who would refuse to release it, and thus the estate would be practically inalienable for a period long beyond the prescribed limit. That is clearly not the law. From the report of *Gilbertson* v. *Richards* the *dictum* there, which I have read, seems to be founded upon a short extract from *Sanders* on Uses, thus cited in the report of the argument. In *Washborn* v. *Downs* (2), cited in *Sanders* on Uses, it is said "a perpetuity is where, if all that have interest join, and yet they cannot bar or pass the estate." The whole passage in

(1) 4 H. & N. 277.

(2) 1 Cas. C. 213.

C. A. 1882 LONDON AND SOUTH WESTERN RAILWAY CO. v. GOMM. Kay, J.

Sanders (1) is this: "It is said in the case of *Washborn* v. *Downs* (2) that a perpetuity is where, if all that have interest join, yet they cannot bar or pass the estate, and in the case of *Scattergood* v. *Edge* (3), that every executory devise is a perpetuity so far as it goes, *i.e.*, an estate inalienable, though all mankind join in the conveyance. But," says *Sanders*: "these definitions of a perpetuity are not accurate. If an estate be limited to the use of *A.* and his heirs, but if *B.* should die without heirs of his body, then to the use of *C.* and his heirs, the limitation to *C.* and his heirs would be void as tending to a perpetuity. Yet *C.* might no doubt release or pass his future estate, and with the concurrence of the necessary parties the fee simple might be disposed of before there was a failure of issue to *B.* A perpetuity may with greater propriety be defined to be a future limitation restraining the owner of the estate from aliening the fee simple of the property discharged of such future use or estate before the event is determined or the period arrived when such future use or estate is to arise. If that event or period be within the bounds prescribed by law it is not a perpetuity."

This was written before the passing of the Act 8 & 9 Vict. c. 106, which only gives the power to alienate certain contingent interests then inalienable. But many cases besides that given by *Sanders* might be put in which a contingent interest which might be alienated or released before that Act would nevertheless be void if so limited that it might not arise within a life or lives in being and twenty-one years afterwards. It is impossible to assert as a general proposition that where the owner of an estate and the owner of such a contingent interest can together make a good title, or one can release to the other, the rule of perpetuities does not apply.

But it is very singular that the case of *Washborn* v. *Downs*, which seems to be the foundation of these *dicta*, hardly seems to justify the short report of it given by *Sanders*. In that case an equitable tenant in tail sought to suffer a recovery, and it seems to have been argued that unless he could do so there would be a perpetuity. The answer appears to have been No, because

(1) 5th Ed. p. 203. (2) 1 Cas. C. 213.
(3) 1 Salk. 229.

with the concurrence of the trustee, the owner of the legal estate, he could do so. The passage quoted refers to some such argument as this. The words of the report are these: "The Court in the principal case took time to advise, and advised the parties to agree. And in the debate of this case it was said that a perpetuity is where if all that have interest join and yet cannot bar or pass the estate. But if by the concurrence of all having the estate tail it may be barred, it is no perpetuity." This does not mean that if a person presently entitled to the benefit of a springing use or executory devise void for perpetuity can release it, the power of doing so would prevent its being void. The question whether a *cestui que trust* could suffer a valid recovery was much discussed in the reign of *Charles* II., as appears by the cases of *Goodrick* v. *Brown* (1); *Lord Digby* v. *Langworth* (2); and it was afterwards held in *North* v. *Champernoon* (3) by Lord *Nottingham*, C., that the recovery of the *cestuis que trust* in tail was good, and the trustee would be compelled to convey accordingly. But if I am right in this view thus far, it does not by any means follow that the contract in this case is void.

The rule against perpetuities is a branch not of the law of contract but of property. This is clearly enough stated in page 5 of the Introduction to Mr. *Lewis's* well-known work on Perpetuities, in passages cited from *Butler's* notes to *Fearne* on Contingent Remainders and from *Jarman* on Wills. Mr. *Lewis*, at page 164, adopts the definition of a perpetuity which I have read from *Sanders*, and adds one of his own, which runs thus: "In other words, a perpetuity is a future limitation, whether executory or by way of remainder, and of either real or personal property, which is not to vest until after the expiration of, or will not necessarily vest within, the period fixed and prescribed by law for the creation of future estates and interests; and which is not destructible by the persons for the time being entitled to the property subject to the future limitation, except with the concurrence of the individual interested under that limitation."

A contract not creating any estate or interest properly so called in property, at Law or Equity, is not, in my opinion, obnoxious

(1) 1 Cas. C. 49. (2) 1 Cas. C. 68.
(3) 2 Cas. C. 78.

C. A. 1882 — LONDON AND SOUTH WESTERN RAILWAY CO. v. GOMM. — Kay, J.

to the rule. For instance, a covenant to pay £1000 when demanded, with interest meanwhile, if not barred by the *Statute of Limitations*, might be enforced by an action of covenant at any time. A contract to buy or sell land and covenants restricting the use of land, though unlimited, are not void for perpetuity. In these latter cases the contracts do not run with the land, and are not binding upon an assign, unless he takes with notice. They are not properly speaking, estates or interests in land, and are therefore not within the rule. I think that this is the true test to apply to this case, and am of opinion that this covenant does not create any interest in land. A purchaser without notice from *Powell* would not be bound by it. It is not, I think, within the rule against perpetuities at all. Consequently I hold that objection to fail; and as the Defendant took the land with notice, I hold that he is bound in Equity by the covenant, on the principle of *Tulk* v. *Moxhay* (1).

I therefore make the usual decree for specific performance, with costs. I suppose the title is accepted, if not there must be the usual reference as to title.

T. W. G.

C. A.

The Defendant appealed. The appeal was heard on the 6th of March, 1882.

Davey, Q.C., *Whitehorne*, Q.C., and *Vaughan Hawkins*, for the Appellant:—

We say that the case of the Plaintiff fails on two grounds: first, the sale of 1865 was not an absolute sale such as is required by the *Lands Clauses Act*, s. 127, and was therefore void; and, secondly, the covenant is bad for remoteness.

The covenant is not a mere personal covenant, but gives an interest in the land: *Moore* v. *Clench* (2). Now an equitable interest in land to arise on an event which may not happen till after the period allowed by the rules as to remoteness is void. A definition of a perpetuity is given in *Lewis* on Perpetuity (3), and the observations of Mr. *Sanders*, Uses and Trusts (4), are referred to.

(1) 2 Ph. 774.
(2) 1 Ch. D. 447.
(3) Pages 163, 164.
(4) 5th Ed. p. 203.

The principle is laid down in *Lord Southampton* v. *Marquis of Hertford* (1). The proposition in *Gilbertson* v. *Richards* (2) is only a *dictum*.

[JESSEL, M.R. :—It is only a *dictum*, and in my opinion an erroneous one. Lord *St. Leonards* (3) points out that the decision can be supported on other grounds.]

The decision in *Birmingham Canal Company* v. *Cartwright* (4) is no doubt directly in point against us, but we ask the Court to overrule it. The true rule is, that a future executory interest which may prevent the owners of the estate from alienating it for a period exceeding the allowed period, is invalid. Mr. Justice *Kay* held this to be the rule, and expressly dissented from *Birmingham Canal Company* v. *Cartwright* and the *dictum* in *Gilbertson* v. *Richards*, but held that the rule did not apply, because this was a case only of personal contract. If it be a case of personal contract only the Plaintiffs are out of Court, for such a contract cannot be enforced against the Defendant who was no party to it. In *Stocker* v. *Dean* (5) Lord *Romilly* held a covenant of this nature to be restricted to the life of the covenantor, but it is impossible here to limit the covenant as to time—the very essence of the bargain is that the company may repurchase at any time however remote. The decision in *Ferrand* v. *Wilson* (6) as to power to cut timber, supports our case as to remoteness.

Tulk v. *Moxhay* (7) and the other cases of that class, where restrictive covenants have been enforced against a purchaser with notice, have really no bearing on the case. Such covenants do not offend against the rule as to remoteness, because they do not give an estate or interest in the land to any one else.

Then as to the question whether the transaction of 1865 was *ultrà vires*, was this land in that year superfluous land or not? The period of ten years limited by sect. 127 of the *Lands Clauses Consolidation Act*, 1845, having expired and the land not having been used for the purposes of the company, the presumption was that they did not want it, but it was competent to them to shew

(1) 2 V. & B. 54.
(2) 4 H. & N. 297.
(3) *Sugden* on Powers, 8th Ed. p. 16.
(4) 11 Ch. D. 421.
(5) 16 Beav. 161.
(6) 4 Hare, 344.
(7) 2 Ph. 774.

C. A. 1882

LONDON AND SOUTH WESTERN RAILWAY CO. v. GOMM.

that they did. They, however, stated that the land was superfluous, which made it their duty to sell it. The law as to what is superfluous land is laid down in *Hooper* v. *Bourne* (1); *Betts* v. *Great Eastern Railway Company* (2); and *Great Western Railway Company* v. *May* (3). Now sect. 127 requires an absolute sale and the company must sell out and out, which is illustrated by *In re Metropolitan District Railway Company and Cosh* (4). The transaction therefore, was void, as being a conditional and not an absolute sale, and the land either revested in *Powell* under sect. 127, or if not superfluous remained in the company and *Powell* acquired a title to it under the *Statute of Limitations*. It is said that even if this be so the company could enter into a contract of this kind, giving them a right to buy, and the Judge below relied on *Kemp* v. *South Eastern Railway Company* (5), and *Hooper* v. *Bourne*. Neither of them supports his decision. In *Kemp* v. *South Eastern Railway Company* the time for completing the works had not expired, and *Hooper* v. *Bourne* merely turned on the question whether the land was superfluous. The transaction of 1865 was a scheme to evade the requisitions of sect. 127, and sell land, reserving an interest in it, which device the Court will not sanction.

Rigby, Q.C., and *Gaselee, contrà* :—

This land was not wanted in 1865, but there was a prospect that it would be, and the arrangement was a reasonable one.

[JESSEL, M.R.:—No doubt it was. You need only concern yourself with the objections to its legality.]

At the time when the conveyance was made the company had power to purchase, though not compulsorily, and it was within their powers to bargain for an option of purchase: *Kemp* v. *South Eastern Railway Company*. There is no perpetuity, for the land is not made inalienable. *Tulk* v. *Moxhay* (6) and the cases of that class shew that land may be subjected to a burden for an indefinite period, without being liable to any objection on the ground of remoteness. In *Liverpool* leases for 999 years it is common to give an unlimited option of purchase.

(1) 5 App. Cas. 1.
(2) Law Rep. 8 Ex. 294; 3 Ex. D. 182.
(3) Law Rep. 7 H. L. 283.
(4) 13 Ch. D. 607.
(5) Law Rep. 7 Ch. 364.
(6) 2 Ph. 774.

[JESSEL, M.R.:—What is the distinction between this case and a conditional limitation, that if *A. B.* pays £100 at any time the estate shall vest in him?]

That notice is material in one case and not in the other.

[JESSEL, M.R.:—Equity only follows the Law in such cases. That the equity may be got rid of by purchase for value without notice cannot affect the question of remoteness.]

A covenant to renew a lease at the end of forty or fifty years has always been considered good, and a covenant to grant a renewed lease containing a similar covenant for renewal: *Hare* v. *Burges* (1).

[JESSEL, M.R.:—That is an exception from the general rule.]

The ownership may be restricted in perpetuity by covenants which leave little more than a bare legal estate in the covenantor; as, for instance, a covenant not to build on a strip of land between houses and the sea. In *Kemp* v. *South Eastern Railway Company* (2) it was not suggested that the rule as to remoteness affected the case. *Birmingham Canal Company* v. *Cartwright* (3) is an express authority in our favour.

Davey, in reply:—

Covenants to renew leases are distinguishable, for they run with the land at law.

[He was then stopped by the Court.]

JESSEL, M.R.:—

This is an appeal from a decision of Mr. Justice *Kay*, and it raises two points: first, whether an option of repurchase given to the *London and South Western Railway Company* by a deed of sale entered into between the company and one *Powell*, the predecessor in title of the Defendant *Gomm*, is obnoxious to the rule against remoteness; and secondly, whether the deed itself is or is not void, having regard to the 127th section of the *Lands Clauses Consolidation Act*, 1845.

(1) 4 K. & J. 45. (2) Law Rep. 7 Ch. 364.
(3) 11 Ch. D. 421.

C. A. 1882 LONDON AND SOUTH WESTERN RAILWAY CO. v. GOMM. Jessel, M.R.

The deed was made in 1865 after the compulsory powers of the railway company had expired, and it recited that the company was seised of the land which was no longer required for the purposes of their railway and had contracted to sell it to *Powell*, who was the adjoining owner, at the sum of £100, subject to the condition thereinafter contained. The company then conveyed the land to *Powell* in fee for £100, and the deed contained this covenant by *Powell*:—[His Lordship read the covenant giving the option of repurchase to the company.]

Now that is unlimited in point of time, and it does not appear to me to be possible to insert a limit of time, because to put in the words "within a reasonable time," or any other words limiting the time, would be exactly contrary to the intention of the parties. It is not only unlimited in point of time but it is obviously intended so to be. The railway company do not want the land now, and they do not know that they ever will want it, but their bargain is that whenever it may be required for the works of the company the owners or owner for the time being of the land are or is to convey to the company. The very essence of the contract is that it shall be indefinite in point of time. You cannot, as in *Kemp* v. *South Eastern Railway Company* (1), insert by intendment the limitation that the land is to be taken before the time for executing the works had expired, for in this case the time for the execution of the works had already expired. It appears to me therefore plain (and indeed it was admitted in argument by the Respondents) that the option is unlimited in point of time.

If then the rule as to remoteness applies to a covenant of this nature, this covenant clearly is bad as extending beyond the period allowed by the rule. Whether the rule applies or not depends upon this as it appears to me, does or does not the covenant give an interest in the land? If it is a bare or mere personal contract it is of course not obnoxious to the rule, but in that case it is impossible to see how the present Appellant can be bound. He did not enter into the contract, but is only a purchaser from *Powell* who did. If it is a mere personal contract it cannot be enforced against the assignee. Therefore the company must admit that it somehow binds the land. But if it binds the land it creates

(1) Law Rep. 7 Ch. 364.

an equitable interest in the land. The right to call for a conveyance of the land is an equitable interest or equitable estate. In the ordinary case of a contract for purchase there is no doubt about this, and an option for repurchase is not different in its nature. A person exercising the option has to do two things, he has to give notice of his intention to purchase, and to pay the purchase-money; but as far as the man who is liable to convey is concerned, his estate or interest is taken away from him without his consent, and the right to take it away being vested in another, the covenant giving the option must give that other an interest in the land.

It appears to me therefore that this covenant plainly gives the company an interest in the land, and as regards remoteness there is no distinction that I know of (unless the case falls within one of the recognised exceptions, such as charities) between one kind of equitable interest and another kind of equitable interest. In all cases they must take effect as against the owners of the land within a prescribed period.

It was suggested that the rule has no application to any case of contract, but in my opinion the mode in which the interest is created is immaterial. Whether it is by devise or voluntary gift or contract can make no difference. The question is, what is the nature of the interest intended to be created? I do not know that I can do better than read the two passages cited in argument from Mr. *Lewis's* well-known book on Perpetuities at page 164. He cites with approbation this passage from Mr. *Sanders'* Essay on Uses and Trusts: "A perpetuity may be defined to be a future limitation, restraining the owner of the estate from aliening the fee simple of the property discharged of such future use or estate before the event is determined or the period is arrived when such future use or estate is to arise. If that event or period be within the bounds prescribed by law it is not a perpetuity." Then Mr. *Lewis* adds these words: "In other words, a perpetuity is a future limitation whether executory or by way of remainder and of either real or personal property, which is not to vest until after the expiration of, or will not necessarily vest within, the period fixed and prescribed by law for the creation of future estates and interests; and which is not destructible by the persons for the time being entitled to the property subject to the future limitation,

C. A. 1882

LONDON AND SOUTH WESTERN RAILWAY CO. v. GOMM.

Jessel, M.R.

except with the concurrence of the individual interested under that limitation."

Now is there any substantial distinction between a contract for purchase, or an option for purchase, and a conditional limitation? Is there any difference in substance between the case of a limitation to *A.* in fee, with a proviso that whenever a notice in writing is sent and £100 paid by *B.* or his heirs to *A.* or his heirs the estate shall vest in *B.* and his heirs, and a contract that whenever such notice is given and such payment made by *B.* or his heirs to *A.* or his heirs, *A.* shall convey to *B.* and his heirs? It seems to me that in a Court of Equity it is impossible to suggest that there is any real distinction between these two cases. There is in each case the same fetter on the estate and on the owners of the estate for all time, and it seems to me to be plain that the rules as to remoteness apply to one case as much as to the other.

That appears to me to dispose of the case, unless we agree with the conclusion of Mr. Justice *Kay* on the last point considered by him. Down to that point I agree with him. I consider that he is quite right in the view he takes of the doctrine of remoteness and of the authorities cited before him, not forgetting the case of the *Birmingham Canal Company* v. *Cartwright* (1), which must be treated as overruled. But Mr. Justice *Kay*, having, as I think he has, most correctly and accurately defined the law, thinks that this case is not within it, because he comes to the conclusion that "this covenant does not create any interest in the land." But he had forgotten that if that were so he could not make a decree against Mr. *Gomm*. If it were a mere contract it was not *Gomm's* contract, and if it did not in equity run with the land so as to give an interest in the land, it could not have been enforced against him. It is clear from his Lordship's judgment that if he had been of opinion that this covenant gave the company an interest in the land (which, I think, is the correct view) he would have decided the case the other way.

With regard to the argument founded on *Tulk* v. *Moxhay* (2), that case was very much considered by the Court of Appeal at *Westminster* in *Haywood* v. *The Brunswick Permanent Benefit Building*

(1) 11 Ch. D. 421. (2) 2 Ph. 774.

Society (1), and the Court there decided that they would not extend the doctrine of *Tulk* v. *Moxhay* (2) to affirmative covenants, compelling a man to lay out money or do any other act of what I may call an active character, but that it was to be confined to restrictive covenants. Of course that authority would be binding upon us if we did not agree to it, but I most cordially accede to it. I think that we ought not to extend the doctrine of *Tulk* v. *Moxhay* in the way suggested here. The doctrine of that case, rightly considered, appears to me to be either an extension in equity of the doctrine of *Spencer's Case* (3) to another line of cases, or else an extension in equity of the doctrine of negative easements; such, for instance, as a right to the access of light, which prevents the owner of the servient tenement from building so as to obstruct the light. The covenant in *Tulk* v. *Moxhay* was affirmative in its terms, but was held by the Court to imply a negative. Where there is a negative covenant expressed or implied, as, for instance, not to build so as to obstruct a view, or not to use a piece of land otherwise than as a garden, the Court interferes on one or other of the above grounds. This is an equitable doctrine, establishing an exception to the rules of Common Law which did not treat such a covenant as running with the land, and it does not matter whether it proceeds on analogy to a covenant running with the land or on analogy to an easement. The purchaser took the estate subject to the equitable burden, with the qualification that if he acquired the legal estate for value without notice he was freed from the burden. That qualification, however, did not affect the nature of the burden; the notice was required merely to avoid the effect of the legal estate, and did not create the right, and if the purchaser took only an equitable estate he took subject to the burden, whether he had notice or not. It appears to me that, rightly considered, that doctrine is not an authority for the proposition that an equitable estate or interest may be raised at any time, notwithstanding the rule against remoteness. It is, if I may say so, another exception to the rules against remoteness, exceptions which had previously been thoroughly established in many cases at law as regards easements, and in equity as regards

(1) 8 Q. B. D. 403. (2) 2 Ph. 774.
(3) 5 Co. Rep. 16a.

C. A. 1882 — LONDON AND SOUTH WESTERN RAILWAY CO. v. GOMM. — Jessel, M.R.

charities. That being so, it does not appear to me that *Tulk* v. *Moxhay* (1) has any direct bearing on the case which we have to decide.

There is another important point which alone would enable us to decide this case in favour of the Appellant. Was the conveyance of 1865 *ultrà vires?* When we look at the provisions of the *Lands Clauses Consolidation Act*, s. 127 *et seq.*, I think we must consider them to mean that at the expiration of the statutory period, if the land is then superfluous, that is, if it is not wanted for the purpose of the railway, the company must sell it under the penalty of losing it by its revesting in the adjoining owner. There is no doubt that the company can, before the expiration of the statutory period, determine that the land is superfluous and sell it, and it is equally clear that if at the end of the statutory period they think that the land may be required for the purpose of their railway it is not then superfluous. When I say "they think," I mean if their proper advisers have fairly and reasonably come to that conclusion, that is sufficient. So that the fact of its being superfluous may be determined beforehand by the action of the company, or it may be delayed after the expiration of the statutory period without the land being actually used, but whenever it is determined, either before or after the expiration of that period, that the land is superfluous, it becomes saleable or vests in the adjoining owner.

That being so, it is plain that when land is sold as superfluous, no interest in it can be retained by the company. Now if I am right in the conclusion at which I have arrived as to the nature of this option of repurchase an interest was retained by the company. The form of the conveyance is plain. It recites a contract for sale subject to the condition thereinafter mentioned. That is not an absolute sale but a conditional sale. Now the statute in terms requires an absolute sale, and that being so, the company could not sell, reserving an option of repurchase. The sale itself therefore was beyond their power, and was a void sale, and we must recollect that this is a statute which governs the legal estate as much as the equitable estate. Then what follows? The land if superfluous revested in Mr. *Powell* under sect. 127 at the end of

(1) 2 Ph. 774.

the ten years, free from any restriction, which would give him a title; but if it was not superfluous, then as the statutory period of limitation had elapsed before the commencement of this action, the Appellant would have obtained a title under the *Statute of Limitations*. In either case, therefore, the Appellant's title must be valid as against the title of the company.

On these grounds it seems to me that the present appeal ought to be allowed.

SIR JAMES HANNEN:—

The first question in this case is as to the effect of the deed of the 10th of August, 1865.

It appears to me that the company are estopped from denying that this land was superfluous land at the time of the sale to *Powell*. It is expressly recited that the land is no longer required, and that they thereupon propose to sell it at a particular price.

It is perfectly plain that the company has only the right to sell subject to the terms imposed by the legislature in the *Lands Clauses Consolidation Act*. That Act requires the company to sell absolutely, and looking to the history of legislation on this subject I think there is no doubt that particular stress was laid upon the word "absolutely." It was inserted, in my opinion, in order to prevent the company having acquired lands which it was found afterwards were not required for the purpose of the undertaking, from still retaining indirectly a hold upon those lands. It appears to me, therefore, that as this was not an absolute sale, but a conditional sale, it was void, and that the effect would be that at the end of the ten years, there being no sale, the land would vest in *Powell*. At the same time I do not think that every contract made by a railway company for the purpose of settling at the present time what should be the price of land to be acquired by them at some future time would be bad in itself. I think that if there had been a separate contract limited to the time within which the company would have authority to take lands, there would not have been anything illegal in their entering into an arrangement with the owner that they should have a right to purchase at a particular price to save the trouble and inconvenience of having

C. A. 1882

LONDON AND SOUTH WESTERN RAILWAY CO. v. GOMM.

Sir J. Hannen.

the value settled in some other manner, and *Kemp* v. *South Eastern Railway Company* (1) is an authority to that effect.

The next question is, Does this covenant create an interest or estate in the property at law, or in equity. Upon that point I have nothing to add to what has been said by the Master of the Rolls. It is not a subject with which I have been frequently called upon to deal, and therefore, any opinion that I may express on the subject has not the value it would have if it came from one of my learned colleagues, but I must say that it appears to me to be a startling proposition that the power to require a conveyance of land at a future time does not create any interest in that land. If it does create such an interest, then it appears to me to be perfectly clear that the covenant in this case violates the rule against perpetuity, because, taking the passage which has been cited from *Sanders*, "a perpetuity may be defined to be a future limitation restraining the owner of the estate from aliening the fee simple of the property discharged of such future use or estate before the event is determined." Now this covenant plainly would restrain the future owner from aliening the estate to anybody he pleases, it restricts him to aliening it to the railway company in the event of the company exercising their option.

The last question is, supposing this covenant does not create any estate or interest, what is the effect of it as a covenant? It is clear that it is not a covenant which would run with the land at law. *Spencer's Case* (2) and the notes to it in *Smith's* Leading Cases (3) seem to me to point very clearly to that conclusion. It has been said, however, and in fact the judgment with which we are dealing lays down, that although this is only a personal covenant, yet *Tulk* v. *Moxhay* (4) is an authority for the proposition that such a covenant if known to the purchaser of the estate binds him. This argument is disposed of by the decision of the Court of Appeal in *Haywood* v. *The Brunswick Permanent Benefit Building Society* (5), which seems to me to put a wholesome restriction upon the application of *Tulk* v. *Moxhay*

(1) Law Rep. 7 Ch. 364.
(2) 5 Co. Rep. 16 a.
(3) Vol. i. 8th ed. p. 90.
(4) 2 Ph. 774.
(5) 8 Q. B. D. 403.

by laying down this rule, that it only applies to restrictive covenants, and does not apply to an affirmative covenant such as a covenant binding the owner of the land at some future time to convey it.

For these reasons I am of opinion that the judgment of the Court below cannot be supported, and that the appeal must be allowed.

LINDLEY, L.J.:—

I am of the same opinion. This is an action for specific performance of a contract entered into not by the Defendant but by somebody else. The first thing, therefore, the Plaintiffs must shew is, upon what legal principle the Defendant is bound by a contract into which he did not enter.

It is not contended that he is bound by it on the ground that the covenant entered into by *Powell* runs with the land and binds him at law, but it is said that though it does not bind him at law it binds him in equity.

Then upon what principle is it that he is bound in equity? It is said that he is bound in equity because he bought the land knowing of the covenant into which his predecessor in title had entered. That proposition stated generally assumes that every purchaser of land with notice of covenants into which his vendor has entered with reference to the land is bound in equity by all those covenants. That is precisely the proposition which had to be considered in *Haywood* v. *Brunswick Permanent Benefit Building Society* (1), and because it was sought there to extend the doctrine of *Tulk* v. *Moxhay* (2) to a degree which was thought dangerous, considerable pains were taken by the Court to point out the limits of that doctrine. In that case an owner in fee had granted a rent, and in order better to secure it, he covenanted for himself, his heirs and assigns, to build some houses on the land out of which the rent issued and to keep them in repair for ever. It was sought to enforce that covenant by bringing an action for damages against the mortgagee in possession of the land, because the houses had been allowed to get out of repair. It was of course seen that an

(1) 8 Q. B. D. 403. (2) 2 Ph. 774.

C. A. 1882

LONDON AND SOUTH WESTERN RAILWAY CO. v. GOMM.

Lindley, L.J.

action would not lie at law; but it was contended, on the authority of *Tulk* v. *Moxhay* (1), that inasmuch as the Defendants took the land with notice of the covenants they were bound by them in equity. The Court of Appeal declined so to extend the doctrine of *Tulk* v. *Moxhay*, and their reasons will be found very carefully stated by Lord Justice *Cotton* in his judgment. The conclusion arrived at by the Court was that *Tulk* v. *Moxhay*, when properly understood, did not apply to any but restrictive covenants. The case of *Cooke* v. *Chilcott* (2) before Vice-Chancellor *Malins* was very much considered, but it was not followed by the Court of Appeal. Here we are asked to extend the doctrine of *Tulk* v. *Moxhay*, and to apply it to a covenant to sell land at any time for a specified sum of money. That this is an extension of the doctrine cannot, I think, be denied; and for the reasons which were given by the Court of Appeal in the case to which I have referred I think we ought to decline to extend that doctrine. If so, how is *Gomm* to be held to be bound by this covenant? He did not enter into it, he is not bound at law, and *Tulk* v. *Moxhay* is no authority for saying that he is bound in equity. That appears to me to dispose of this case.

I agree with the observations made by the other members of the Court, that this covenant creates an interest in land and is void for remoteness. On the question of remoteness one view was taken by Mr. Justice *Kay* in this case, and the other view by Mr. Justice *Fry* in *Birmingham Canal Company* v. *Cartwright* (3). My own view is that the observations made by Mr. Justice *Kay* on that case and on *Gilbertson* v. *Richards* (4) are sound. The error in his judgment appears to me to be, that he has applied *Tulk* v. *Moxhay* to this case without sufficiently considering the extent to which he was carrying it.

As regards the observations upon sect. 127 of the *Lands Clauses Consolidation Act*, I also concur with the other members of the Court. It appears to me that inasmuch as the company could only sell by virtue of that section which requires an absolute sale, and as the sale which they made was not an absolute sale within the true meaning of that clause, the logical consequence is that the whole

(1) 2 Ph. 774.
(2) 3 Ch. D. 694.
(3) 11 Ch. D. 421.
(4) 4 H. & N. 277; 5 H. & N. 453.

transaction is void, and on this ground, if there had been no other, the Court must have declined specifically to perform the contract.

I am therefore of opinion that the appeal must be allowed, and judgment must be for the Defendant.

Mr. *Davey* asked that the costs of the short-hand notes of Mr. Justice *Kay's* judgment might be allowed.

JESSEL, M.R.:—

We have not used them, but have read Mr. Justice *Kay's* judgment in the *Law Journal*. If that report had appeared a sufficient length of time before your brief was delivered, we should not have allowed the costs of a short-hand note; but as it was published so late as the 3rd of March, we think the costs ought to be allowed.

Solicitor for Plaintiffs: *M. H. Hall.*
Solicitors for Defendant: *Wright & Pilley.*

H. C. J.

COOPER *v.* CRABTREE.

[1881 C. 4841.]

Nuisance—Obstruction of Light—Injunction—Cause of Action—Reversioner.

The Plaintiff was the owner in fee of a cottage, the Defendant owned some land immediately adjoining. The Plaintiff alleged that the Defendant had erected on the Plaintiff's land a hoarding on poles in order to block out the access of light to a window in the cottage, and had in so doing committed a trespass.

The Plaintiff also alleged that the poles and hoarding produced a rattling and creaking noise which was an intolerable nuisance to the Plaintiff and his tenants. The Plaintiff claimed an injunction to restrain the trespass and the nuisance.

At the trial it was proved that the cottage was in the occupation of a weekly tenant of the Plaintiff, who was not a party to the action. There was no evidence that the acts of the Defendant had caused any diminution of value of, or other injury to, the reversion:—

Held (affirming the decision of *Fry*, J.), that the poles and hoarding not being of such a permanent character as to injure the reversion the Plaintiff

C. A.
1882
COOPER
v.
CRABTREE

could not maintain an action for trespass; and that the erection of the poles on the Plaintiff's land was too trifling an injury to entitle the Plaintiff to an injunction.

Rochdale Canal Company v. *King* (1) distinguished.

THIS was an appeal from a judgment of Mr. Justice *Fry* (2).

The facts, which are fully stated in the previous report, were shortly as follows:—

The Plaintiff was the owner in fee of a cottage which adjoined on the north a piece of land belonging to the Defendant. The Plaintiff's cottage had a window overlooking the Defendant's land, and in order to prevent the Plaintiff from acquiring a prescriptive right to light, the Defendant set up a hoarding on poles in order to block up the light coming to the window. The Plaintiff alleged that a strip of land 1 ft. 9 in. in breadth between the cottage and the Defendant's land belonged to him, and that the poles supporting the hoarding were placed on this strip of land. The cottage was not in possession of the Plaintiff, but was let to weekly tenants. The Plaintiff in his statement of claim alleged that the poles were on his land, that the erection was a nuisance to him and his tenants by rattling and creaking, and if continued would oblige the tenants to leave the cottage; and he claimed an injunction to restrain the Defendant from allowing the poles and hoarding to remain on his land, and in any event to restrain the Defendant from allowing them to remain so as to be a nuisance to the Plaintiff or his tenants, and damages for the trespass and nuisance. The tenant was not made a party to the action.

The Defendant denied that the poles were erected on the Plaintiff's land.

The Plaintiff originally alleged that a brick wall had been erected by the Defendant on the Plaintiff's land; but that point was afterwards abandoned.

Mr. Justice *Fry* held that assuming that the poles were erected on the Plaintiff's land, the poles and hoarding were not of such a permanent character as to injure the reversion, and dismissed the action with costs.

From this decision the Plaintiff appealed.

On the appeal the nuisance from noise was not insisted on.

(1) 2 Sim. (N.S.) 78. (2) 19 Ch. D. 193.

Cookson, Q.C., and *E. Ford*, for the Appellant:—

We are entitled to an injunction in this case. The placing of an edifice on the land is an injury to the reversion. It is not a mere temporary trespass; it is intended to be permanent. The present action is not to get damages, but to obtain a declaration of the right to the strip of land, and it is not necessary for us to prove substantial damage. It is a more convenient way of obtaining such a declaration than an action for ejectment: *Rochdale Canal Company* v. *King* (1); *Hilton* v. *Earl Granville* (2); *Bickett* v. *Morris* (3); *Goodson* v. *Richardson* (4); *Tucker* v. *Newman* (5).

Fischer, Q.C., and *W. Baker*, for the Defendant, were not called on.

JESSEL, M.R.:—

I must say, speaking for myself, that this is a most trumpery action, that is when you take away all that has been abandoned by the Plaintiff.

The Plaintiff is the owner of a cottage in a small street in *Halifax* which is let at 4*s.* a week. His sole remaining complaint is that the Defendant has put up two small poles and a piece of board for the purpose of obstructing one of the windows of the cottage. It is a new window, and the Defendant's right to obstruct it is plain enough. He wishes to obstruct it for a legitimate purpose, because his land is building land and he is afraid that the Plaintiff will acquire a right of light which may prevent his building on this land. The Defendant has not behaved at all unreasonably, he offered to give the Plaintiff a licence to use the window for 2*s.* 6*d.* a year until he wanted to build on the land. The real complaint of the Plaintiff is the obstruction of the window by the board. No doubt he alleges that the poles have been put up on his land; and he also complained of a wall being built, and of a nuisance from the erecting of the board, but those complaints have been abandoned, and it is clear that the only injury really apprehended is the stopping up of the window.

(1) 2 Sim. (N.S.) 78.
(2) 5 Q. B. 701; Cr. & Ph. 283.
(3) Law Rep. 1 H. L., Sc. 47.
(4) Law Rep. 9 Ch. 221.
(5) 11 Ad. & E. 40.

C. A. 1882 COOPER v. CRABTREE. Jessel, M.R.

The strip of land in dispute is only about one foot nine inches wide and the removal of the poles a few inches back would do the Plaintiff no good. The real injury complained of is not the injury done by the poles to the land but to the cottage. There is no substantial injury at all to the land; it is a bit of vacant land, and it is obvious that running stakes into it is no substantial injury to it. It is equally obvious that the structure is not a permanent one, it can be removed in five minutes, and it is not intended to remain, its object being to obstruct the right only for a year. That being so, the Plaintiff is not in a position to maintain an action for trespass because he has a tenant in occupation of the cottage, nor can he maintain an action for the nuisance, because it does not affect him. What he asks is for an injunction to restrain the trespass, though he cannot maintain an action for trespass. No authority has been cited for such a proceeding, nor do I know of any; and I am not inclined to extend the jurisdiction of the Court in such a case.

It has been said in argument that the amount of damage to the property has nothing to do with the question. I do not agree with that proposition. I agree that there are cases in which there may be enormous injury to the property, though the actual damage done by the trespass is nothing; as in *Bowser* v. *Maclean* (1). There the Defendant, who was entitled to a mine, was complained of for carrying coals by an underground tramway under the Plaintiff's land which he had no right to use. The trespass did no damage to the Plaintiff's land, but it was an enormous injury to him, because he would compel the Defendant to pay a heavy rent for wayleave. So in *Rochdale Canal Company* v. *King* (2). That was a claim by a canal company to restrain the millowners on the banks from taking water from the canal for the use of their mills. The quantity of water abstracted was very small, there was no substantial damage to the canal company, enough water being left for navigation, but as the water belonged to the company they had a right to claim from the Defendants a large sum of money for the privilege of using it, and they were deprived of that profit by the Defendants' wrongful act.

(1) 2 D. F. & J. 415. (2) 2 Sim. (N.S.) 78.

Again, in *Goodson* v. *Richardson* (1) the same point arose. That was a case where the owner of some houses, who was constructing waterworks, in carrying the water from the spring to his houses, had to pass under a highway, and laid down pipes for that purpose. The ground under the highway belonged to the owners of the soil on each side, and one of them applied for an injunction to restrain the Defendant from laying down the pipes. Now the ground under the highway could be of no use to the adjoining owner, and could not be damaged by the Defendant's pipes, but as the Defendant invaded his property he had a right to restrain him from doing so. It was a valuable property for which he had a right to obtain payment. An injunction was his only remedy, an action at law would have been no remedy to him.

But in the present case the obstruction of the light, which is the real injury complained of, is not caused by the stakes being put on the Plaintiff's land; there would be the same injury if they were put further back, and that the Defendant is entitled to do. There is no injury to the Plaintiff's property of such a nature as to call for the interference of the Court by injunction; and the Plaintiff not being in possession of the cottage, and the obstruction not being of a permanent nature, and there being therefore no injury to the reversion, the Plaintiff's action altogether fails, and the appeal must be dismissed with costs.

COTTON, L.J.:—

I am also of opinion that this appeal fails. I put out of consideration all the parts of the complaint which have been abandoned by the Plaintiff, and putting them aside the only injury complained of is the trespass of the Defendant in placing two poles in the ground with a hoarding so as to obstruct the Plaintiff's window. The window is let to a tenant: is it shewn that the trespass injures the Plaintiff's reversion? It is clear that it does not, for it is only a temporary erection. Therefore it is simply a trespass for which an action can be brought by the tenant. But it is said that the Defendant claims a right to the land on which the poles are put up, and that he has put them up by way of asserting his right. But his only interference with the

(1) Law Rep. 9 Ch. 221.

C. A. 1882 COOPER v. CRABTREE.

legal right of the Plaintiff (if any) is putting the poles in his land, whereas the real injury complained of is interference with the window, which he cannot complain of. In fact the act was not done for the purpose of asserting a title to the land, but to assert a right which the Defendant really had, namely, to obstruct the Plaintiff's window, and in my opinion, even if he has encroached a little on the Plaintiff's land, as to which I give no opinion, I do not think it is a case in which the Court ought to grant an injunction.

LINDLEY, L.J.:—

I am of the same opinion. The object of this action has totally failed. The Plaintiff's real grievance is that the light which he has enjoyed for some years has been obstructed, and he will lose the benefit of his previous enjoyment. But he cannot help that, because his window is so comparatively recent that the Defendant has a right to obstruct it. Then he is trying to effect his object by an ingenious theory that the Defendant's act is a nuisance: but that ground fails, because the Plaintiff is not in possession and the structure is only temporary, and is no injury to his reversion. Then he says it is a claim of right to his land and a trespass made in assertion of that claim. But what right of the Plaintiff is infringed? His rights as reversioner are not infringed and he has no possessory right. It is not like the *Rochdale Canal Company* v. *King* (1) and other similar cases in which important possessory rights of the Plaintiffs were infringed, as pointed out by the Master of the Rolls. There is no ground for granting an injunction in this case. An ingenious attempt has been made to support this action but it has failed, and the appeal must be dismissed with costs.

Solicitors for Appellant: *Layton & Jaques*, agents for *Holroyde & Smith, Halifax.*

Solicitors for Respondent: *Williamson, Hill, & Co.*, agents for *Foster, England, & Foster, Halifax.*

(1) 2 Sim. (N.S.) 78.

M. W.

ATTORNEY-GENERAL *v.* GUARDIANS OF POOR OF UNION OF DORKING.

[1879 A. 6.]

C. A. 1881
V.-C. H. *Jan.* 12, 13, 24.
C. A. 1882 *March* 22, 24.

Nuisance—Pollution of Stream—Local Board—Neglect of Public Duty—Mandamus—Injunction—Vesting of Sewers in Local Authority—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 17—*Rivers Pollution Act*, 1876 (39 & 40 *Vict. c.* 75), *ss.* 2, 3, 8.

A sanitary authority in whom the sewers are vested have only a limited ownership in them; they are not in the same position as to responsibility for fouling a stream as a private individual, because they cannot stop the sewers on account of the damage to the inhabitants of the neighbourhood. And although, perhaps, the sanitary authority might obtain an injunction to restrain persons from using the sewers who had no right to do so, a landowner complaining of the nuisance cannot bring an action against them for not doing so; because an action cannot be maintained either at Law or in Equity to compel a person to bring an action for the purpose of restraining a nuisance which he cannot himself prevent.

Where a sanitary authority have not themselves constructed sewers which are a nuisance, but only permitted them to be used as formerly by the inhabitants, they are not doing an act which can be restrained under the *Public Health Acts* or the *Rivers Pollution Act*, 1876. But if they are neglecting their duty in providing a sufficient sanitary scheme for the neighbourhood the remedy of an aggrieved landowner is by mandamus.

Per Jessel, M.R.:—The Court will not make an order against a public body or against individuals to do an act unless it is satisfied that it is within their power to do it.

Per Jessel, M.R.:—In dealing with the question of restraining a public body from continuing a state of things which existed before the commencement of their powers, the Court must take into consideration the balance of convenience.

Glossop v. *Heston and Isleworth Local Board* (1) approved and followed.

The order of *Hall*, V.C., affirmed.

THE information and action in this case were brought by Mr. *J. C. Deverell*, the owner of a house and grounds in the parish of *Dorking*, for the purpose of restraining the Defendants, as the local authority under the *Public Health Act*, 1875, from causing or permitting the sewage from the town of *Dorking*, other than sewage so conveyed by prescriptive right before the commencement of the action, to flow in an unpurified state into the *Pipp*

(1) 12 Ch. D. 102.

C. A. 1882

ATTORNEY-GENERAL v. GUARDIANS OF POOR OF UNION OF DORKING.

Brook, which bounded Mr. *Deverell's* land, so as to create a nuisance.

Mr. *Deverell*, who was Relator and Plaintiff, alleged in the statement of claim that the sewage of the town of *Dorking* was discharged into the *Pipp Brook*, which runs into the River *Mole*; that by reason of the increase of the town the sewage had greatly increased and had become, and would become more and more, a nuisance to the neighbourhood and injurious to the health of the inhabitants as well as a nuisance to himself and his family; that the Defendants had used since the passing of the *Public Health Act*, 1875, and now used, the sewers, drains, and outfalls connected with the town of *Dorking* for the purpose of conveying sewage into the *Pipp Brook* without such sewage being purified or freed from foul matter; that the principal sewers were vested in the Defendants, and that new buildings were continually erected in the town and new drains from them were connected with the sewers vested in the Defendants, so that the quantity of filthy sewage was continually increased; and that the persons by whom such connections were made had not acquired any prescriptive right to drain into the sewers; that the Defendants had made by-laws obliging persons building new houses to connect their drains with the sewers, and forbidding them to drain into cesspools; and that the Defendants had attempted to carry out a scheme for constituting a united district for dealing with sewage, which had proved abortive, and were taking no other measures to remedy the public nuisance and private injury complained of.

The Defendants in their defence denied that there was any such nuisance or injury as alleged; and asserted that the principal sewers had been made and used for at least twenty-four years, and long before the Plaintiff came to reside in his house; that the sewers were not vested in them but in the highway board; that they had not used or made any sewers, drains, or outfalls connected with the town of *Dorking*, but that they had no power to prevent owners of houses from making connections with the public sewers or using the sewers; that the by-law directing builders to make a connnection with the sewers had not been, and would not be, acted upon until some proper scheme of drainage had been completed. And they stated the efforts which they had made and

were making to constitute a system of drainage; and alleged that a scheme for constituting a united district for the drainage of *Dorking* and *Leatherhead* was now before the Local Government Board. The acts done by the Defendants with this object are specially referred to in the judgment of the Master of the Rolls.

The action came on to be heard before Vice-Chancellor *Hall* on the 12th of January, 1881.

Kay, Q.C., *W. F. Robinson*, Q.C., and *Latham*, for the Relator and Plaintiff, referred to *Nuisances Removal Act*, 1855 (18 & 19 Vict. c. 121), s. 3; *Nuisances Removal Act*, 1860 (23 & 24 Vict. c. 77), ss. 1, 2, and 3; *Local Government Amendment Act*, 1861 (24 & 25 Vict. c. 61); *Sanitary Act*, 1866 (29 & 30 Vict. c. 90), s. 17; *Public Health Act*, 1872 (35 & 36 Vict. c. 79), s. 5; *Public Health Act*, 1875 (38 & 39 Vict. c. 55), ss. 13, 19, 21, and 182; and cited *Attorney-General* v. *Richmond* (1); *Glossop* v. *Heston and Isleworth Local Board* (2).

W. Pearson, Q.C., and *Vaughan Hawkins*, for the Defendants:—

These sewers are not vested in the Defendants. They were made by the highway board, and are still vested in that board; and the Relator was mistaken in making the guardians of the poor Defendants. The Act of 1875 does not apply to any sewer which is (as this is) a drain under the control of a highway board, and such a drain remains the property of the authority which constructed it. The reason of this is obvious, for otherwise the country might be overflowed, as the road drains in fact carry the whole surface water of the district: *General Highway Acts* (5 & 6 Will. 4, c. 50), s. 18; 25 & 26 Vict. c. 61, ss. 5, 7, 9, 11; *Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 Vict. c. 77), s. 12; *Public Health Act*, 1848 (11 & 12 Vict. c. 63), s. 43; *Local Government Act*, 1858 (21 & 22 Vict. c. 98), s. 12; *Local Government Amendment Act*, 1861 (24 & 25 Vict. c. 61); *Local Government Amendment Act*, 1863 (26 Vict. c. 17): *Sewage Utilization Act*, 1865 (28 & 29 Vict. c. 75), ss. 3, 4; *Sanitary Act*, 1866 (29 & 30 Vict. c. 90), Part 1; *Sewage Utilization Act*, 1867 (30 & 31 Vict. c. 113); *Nuisances Removal Acts*, 11 & 12 Vict.

(1) Law Rep. 2 Eq. 306. (2) 12 Ch. D. 102.

C. A. 1882 ATTORNEY-GENERAL v. GUARDIANS OF POOR OF UNION OF DORKING.

c. 123; 18 & 19 Vict. c. 121, ss. 3, 21, 22; 23 & 24 Vict. c. 77, ss. 2 and 3; 26 & 27 Vict. c. 117; 29 & 30 Vict. c. 90, part 2, ss. 14, 15, 17, 46; *Public Health Act*, 1872 (35 & 36 Vict. c. 79), ss. 3, 4, 5, 8; *Public Health Act*, 1875 (38 & 39 Vict. c. 55), ss. 13, 14, 15, 17, 21; *Sanitary Act*, 1868 (31 & 32 Vict. c. 115), ss. 3, 4. But even assuming that these sewers were vested in the Defendants, and that a nuisance exists, the Defendants are not responsible for or liable to be sued in respect of that nuisance, for they have done no act to create or increase it. They have not themselves made the drains in question, but are only using in the accustomed manner the drains they found in existence when they were constituted a public body; and the remedy, if any, of the Plaintiff against a rural sanitary authority under the *Public Health Act*, 1875, in which character the Defendants are being sued, is not by an action in the Chancery Division, but by the prerogative writ of mandamus, which should be sued out in the Queen's Bench Division: *Glossop* v. *Heston and Isleworth Local Board* (1); *Attorney-General* v. *Richmond* (2).

Kay, in reply :—

The question depends upon the construction of the 13th section of the Act of 1875. These sewers, some of which were made by the highway board and some by private persons, and all of which drain more than one house, are vested in the rural sanitary authority, *i.e.*, the guardians of the poor of *Dorking*.

1881. Jan. 24. HALL, V.C. :—

The Defendants contend that according to the correct construction of the definition of "sewer" in the interpretation clause contained in the *Public Health Act*, 1875, and of the exceptions and proviso contained in sect. 13 of that Act; and having regard to the evidence of Mr. *Martin*, Mr. *Matthews*, and Mr. *Shearburn*, the existing sewers are not vested in them. With this part of the case I do not intend to deal, as it seems to me to be unimportant; for assuming the sewers to be vested in the Defendants, my judgment is still in their favour.

The case of the informant and Plaintiff is founded upon the

(1) 12 Ch. D. 102. (2) Law Rep. 2 Eq. 306.

Defendants having acted under the *Public Health Act* by user of the sewers, without the sewage being freed from noxious matter. The Defendants deny any user by them of the sewers. The statement of claim sets out a by-law made by the Defendants. [His Lordship then read this by-law.] This by-law, it is said, shews user of the sewers by the Defendants, or such acting by them in reference to the drains and sewers, as renders them liable to be restrained by the injunction applied for. The by-law makes provision as to the mode of constructing drains and connecting them with the sewers, but does not authorize any unlawful user of a sewer. Further, it is one of many by-laws, and does not, I think, establish that the Defendants have used the sewers, or so acted in reference to them as to render them liable to be restrained, as asked in the statement of claim, or to the limited extent asked at the Bar, namely, from allowing any further connections to be made without the sewage being freed from noxious matter. The judgment of Lord Justice *Cotton* in the case of *Glossop* v. *Heston and Isleworth Local Board* (1) shews what is meant by user in the 17th section of the Act, and I think it would be at variance with the judgment in that case to hold that the making of by-laws was user actual, or, if that would suffice, constructive, of the sewers.

Upon the whole, I think, the present case is governed by the case of *Glossop* v. *Heston and Isleworth Local Board*, in which case it is to be observed that the sewers were vested in the defendants. In the case of *Attorney-General* v. *Richmond* (2) the predecessors of the Defendants had made a sewer, and the Defendants were actually using it.

The information and action, therefore, are dismissed with costs.

W. W. K.

C. A.

From this judgment the Plaintiff appealed.

After the notice of appeal was given a local board was formed for the whole district, in consequence of which the Defendants ceased to be rural sanitary authority.

The Plaintiff applied to the Court of Appeal to add the new local board as co-Defendants for the purpose of the appeal, but

(1) 12 Ch. D. 102. (2) Law Rep. 2 Eq. 306.

C. A. 1882

ATTORNEY-GENERAL v. GUARDIANS OF POOR OF UNION OF DORKING.

the application was refused on the authority of *Attorney-General* v. *Birmingham, Tame and Rea Drainage Board* (1).

The appeal came on to be heard on the 22nd of March, 1882.

Davey, Q.C., and *Latham*, for the Appellant:—

The sewers were at the time of filing the information vested in the Defendants.

If they were originally vested in the highway board they were taken from it and became vested in the Defendants by the operation of the *Nuisances Removal Act*, 1860 (23 & 24 Vict. c. 77), s. 2, and the *Sanitary Act*, 1866 (29 & 30 Vict. c. 90), s. 17. If they were never vested in the highway board they were vested in the Defendants by virtue of the *Public Health Act*, 1872 (35 & 36 Vict. c. 79), ss. 8, 9, and the *Public Health Act*, 1875 (38 & 39 Vict. c. 55), s. 13. By the 15th and subsequent sections of the last-mentioned Act, the Defendants, as the local authority, are made responsible for the making and using of the sewers and for the disposal of the sewage: *Attorney-General* v. *Richmond* (2). By the same Act s. 21, the owners and occupiers are empowered to drain into the Defendant's sewers, and they have themselves made by-laws requiring the owners of new buildings to do so. Therefore, whether the sewers be vested in the Defendants or not, they have perfect control over them and are bound to see that no nuisance is created by them: *Attorney-General* v. *Colney Hatch Lunatic Asylum* (3); *Attorney-General* v. *Mayor of Birmingham* (4); *Goldsmid* v. *Tunbridge Wells Improvement Commissioners* (5); *Attorney-General* v. *Cockermouth Local Board* (6); *Attorney-General* v. *Leeds Corporation* (7). It may be that the Defendants have made no new sewers, but they have permitted the inhabitants, many of whom have no prescriptive right to do so, to drain into the sewers. Such persons have committed an offence under the *Rivers Pollution Act*, 1876 (39 & 40 Vict. c. 75), ss. 2, 3, and it is the duty of the Defendants to prevent it and to enforce that Act against the offenders, which they have power to

(1) 17 Ch. D. 685.
(2) Law Rep. 2 Eq. 306.
(3) Law Rep. 4 Ch. 146.
(4) 4 K. & J. 528.
(5) Law Rep. 1 Ch. 349.
(6) Law Rep. 18 Eq. 172.
(7) Law Rep. 5 Ch. 583.

do under sect. 8. It is impossible for private individuals to do this, they cannot tell who the offenders are. In *Glossop* v. *Heston and Isleworth Local Board* (1), the local board had only lately entered on their duties, and the Court held they ought to have a reasonable time allowed them to make a system of drainage. The present Defendants have had ample time, but have not remedied the nuisance.

W. Pearson, Q.C., and *Vaughan Hawkins*, for the Defendants, were not called on.

JESSEL, M.R.:—

This Court is bound, as well as the Court below was bound, by the decision in the case of *Glossop* v. *Heston and Isleworth Local Board*, and even if I differed in opinion, which I do not, from the conclusions arrived at by the Court of Appeal in that case I should be bound to decide this case in accordance with it, unless I saw some substantial difference. As it appears to me there is no substantial difference at all. Indeed I will go further and say that there is no tangible difference, if I may use such an expression. As I understand the case of *Glossop* v. *Heston and Isleworth Local Board* there were sewers vested in the Defendants, the local board, and I will assume for the purpose (and we have not heard the Respondents) that the sewers in this case are vested in the guardians, or rather that they were vested in them at the time this action was brought. There is a good deal no doubt to be said about the construction of the Acts, but, speaking for myself, subject to what might be said by the Respondents, I should think that it was so; but I give no definite opinion because it is not necessary. I will assume it. Now it was undoubtedly so in the case of the local board in *Glossop* v. *Heston and Isleworth Local Board*. In that respect therefore the two cases are alike. In the next place it is admitted here, and was proved there, that as regards a large portion of the sewers there are prescriptive rights—that is, there are a vast number of persons who have the right, having used the sewer for more than twenty years, to send their

(1) 12 Ch. D. 102.

C. A. 1882 ATTORNEY-GENERAL v. GUARDIANS OF POOR OF UNION OF DORKING. Jessel, M.R.

drainage down the sewer. In this case the main sewer was made more than twenty-four years ago, and it has been used ever since, and largely used. In the case of *Glossop* v. *Heston and Isleworth Local Board* (1) it appears that one of the sewers had been used certainly from the time of *Oliver Cromwell*, if not before, and therefore it was a very old sewer indeed, subject to a question whether another sewer had not been substituted for it under the powers of the Act, which was expressly with reference to the persons having a prescriptive right—that is a right to use the substituted sewer as they had the old sewer. In that respect the two cases are alike. In the next case it is the same as the *Glossop* case in that it is a case of a gradual increase of nuisance. That is in addition to the persons who have prescriptive rights there are a great many people who have no prescriptive rights who drain their houses into this sewer, and by reason of that additional sewage the nuisance to the Plaintiff's stream is very much increased. Here again the impression produced on my mind by the evidence is so far in favour of the Appellant. It appears to me that it is a similar case to *Glossop's Case*, where there was also an increasing nuisance, but the Defendants had not done anything as regards that particular sewer, and they had endeavoured to carry out the powers given to them by the Act of Parliament to acquire land, and so on. The time that elapsed had not been so great as in this case, but the same point occurred.

The Defendants here say that in order to construct a new system of drainage, which is what they ought to do, and what they intend to do when they can, they must acquire land, and they have endeavoured to acquire land, but unfortunately they have not been successful. Now upon that point I think it is as well to shew what they have done. The action in the present case was brought in the beginning of 1879. That being the position of matters, what happened was this—the *Public Health Act* came into operation on the 10th of August, 1872, and as early as October of that year the Defendants employed Sir *Joseph Bazalgette* to report, and he did report in December in that year. They found a difficulty about dealing with his report because they thought that the proposed drainage did not comprise the whole

(1) 12 Ch. D. 102.

district it should be applied to, and consequently, after a great deal of deliberation, they applied in December, 1874, to the Local Government Board to make them a new drainage district. The Local Government Board does not seem to have hurried itself, for it was not until February, 1877, that the request was complied with. During the interval they employed another engineer, Mr. *Birch*, that was in June, 1871, and he told them to get twelve acres of land to make the sewage works. They gave the notice accordingly, and thereupon the Local Government Board directed one of their inspectors to hold an inquiry under the *Local Government Act*. This inquiry took place, but they were so strongly opposed that their counsel, Mr. *Michael*, advised them not to contest it further but to give it up and try to get some other land. We are told by the affidavit that these abortive proceedings cost the Defendants a very large sum of money. Therefore they were in earnest. Then they started again, and after they got new power to take lands, the Local Government Board, in June, 1878, appointed a committee to confer with the representatives of the parish of *Leatherhead* as to a joint scheme, and they made another application on the 27th of November, 1878, to constitute the *Dorking* special drainage district and the parish of *Leatherhead* a united district. In the month of November, 1879, this action having been brought in January, 1879, the Local Government Board directed an inquiry to be made before Mr. *Arnold Taylor* upon the application, and he made an adverse report, and thereupon the board declined to proceed with the matter further until a portion of the parish of *Leatherhead* was constituted a special drainage district, and such last-mentioned special drainage district has recently been formed and the application of the Defendants is still before the Local Government Board for consideration. Then they go on to say in their affidavit, that they have by every means in their power sought to obtain suitable land for the reception of the sewage but without success, and they are now, in addition to the above-mentioned application to the Local Government Board, seeking advice of their engineer, Mr. *Birch*, as to an alternative scheme to be proceeded with should such application be refused; they are not neglecting to put their general powers into execution any more than the board were in the case of *Glossop*

C. A. 1882

ATTORNEY-GENERAL v. GUARDIANS OF POOR OF UNION OF DORKING.

Jessel, M.R.

v. *Heston and Isleworth Local Board* (1). I especially mention this because I do not wish it to be inferred that if these public bodies do neglect to exercise their powers there is no way of compelling them to exercise them. However that is not the present case.

This being the position of matters what does the Plaintiff complain of? He says this: "The sewers being vested in you, the Defendants, you allow persons having no prescriptive right of drainage to drain through your sewers into my stream, and thereby cause serious additional pollution." Now there are two points to be considered here. Would the Plaintiff have any right of action at Common Law quite irrespective of these Acts of Parliament by reason of this ownership of the sewers, which I assume for this purpose is vested in the Defendants; and secondly, if they would not, does the *Rivers Pollution Act*, or any other Act, give such a right of action. As to the first point, which does not seem to have been very much discussed in the previous case, we must remember that the vesting of the sewers in the local authority gives them a very limited right of ownership. I am not prepared to say that they are in the same position as a landowner through whose land a sewer, an artificial work, runs. It by no means follows that they have the same right as he has. He can stop it up without asking anybody, but as I read this Act of Parliament I am by no means prepared to say that this local sanitary board can stop the sewer up and thereby cause a most frightful nuisance to the inhabitants of the district whose drainage it is their business to protect and perfect. That is the first difficulty in the way, that the vesting is not an absolute right of ownership but a modified and limited right of ownership, and it does not in my opinion give them a right to stop up the sewer; but independently of that let us consider the matter even assuming they had an absolute right of ownership—could they bring an action at law? I think they could not. It is the case of a landowner with a sewer and drain running through his land through which persons above have a prescriptive right of drainage and of sending sewage down. He cannot stop up the sewer against them. But other persons also above who have no such prescriptive right send sewage down the sewer. As he

(1) 12 Ch. D. 102.

C. A.
1882
ATTORNEY-GENERAL v. GUARDIANS OF POOR OF UNION OF DORKING.
Jessel, M.R.

cannot stop up the sewer how is he to prevent it? I know of no means except by bringing an action, and indeed Mr. *Latham* very fairly argued it upon that ground, not that he could in such a case stop the sewer, but that he could bring an action and get an injunction to prevent them throwing sewage in. Whether he could get such an injunction or not must depend upon circumstances. In the case I put, it by no means follows that he sustains actual damage. It may be utterly immaterial to him whether there is more or less sewage thrown down. Could he maintain an injunction? My present impression is that he could, but upon this particular ground, that if he could not maintain an injunction then these people by going on for twenty years would get a prescriptive right, and he would be entitled to an injunction upon the ground of permanent injury to his property by prescription being acquired over it. Therefore for this purpose I think he could get an injunction. Then the person whose lands are situated lower down on the stream which is polluted says: "You can obtain an injunction to restrain these people sending the sewage down your sewer and therefore I will bring an action against you." What for? Because you do not bring an action for an injunction against the people who are sending the sewage through your land. But suppose he says, I do not care about prescription, so many people already have prescriptive rights of sending this sewage into the sewer that I do not care about other people getting them too. Is he compelled to bring an action for the purpose of asserting his title to prevent a prescription as to which he is perfectly indifferent? It is a most singular thing to say. Independently of that, did any one ever hear of an action against a man because he did not bring an action against his neighbour? It is impossible to suppose that any such action could be maintained. It comes to this, if you could maintain it you would get an injunction against a man for not bringing an injunction action against his neighbour. That is the result of it. As it is the only means he has of preventing the nuisance, it comes to an order that he shall bring an action for an injunction against all his neighbours who are sending down sewage without a prescriptive right into the sewer. That is he would have to fight in every case the question of prescription and acquiescence, and probably other questions which might arise.

C. A. 1882 — ATTORNEY-GENERAL v. GUARDIANS OF POOR OF UNION OF DORKING. — Jessel, M.R.

How can we tell in the absence of the people what the case might be? He may have lost his right by acquiescence or in various other ways. No such action has ever been heard of at Common Law, and I am sure no such action has ever been heard of in Equity, where a person cannot physically put an end to the nuisance, where he can only put an end to it, if at all, by bringing an action for an injunction, and I am satisfied that no action at Common Law lies. Then I come to the statute. If there is no action at Common Law where do you get the right under the statute? The only rights under the statute are, to prevent the local authority from committing a nuisance. They say, "We have done nothing at all, we found the sewers in this state and we left them there." Besides that they have a general scheme of drainage to put in force which they are endeavouring to put in force, and as to which I say, without negligence or without the imputation of negligence upon them, they are doing the best they can. Is that a case which gives the Plaintiff any right to an injunction? I think it does not.

Then I come to the last ground. I must say it appears to me that there is one sentence in the judgment of Lord Justice *Cotton* in the case of *Glossop* v. *Heston and Isleworth Local Board* (1) which puts an end to this case altogether. He says this (2): "But it would be contrary to the course of the Court to make a decree of that nature against the defendants unless the Court is satisfied that there is some particular mode by which they can carry into effect this scheme of drainage and in that way exercise the powers of this Act of Parliament." In other words it comes to this—we are asked to enjoin a man or a corporation under the penalty of sequestration of his property or some other penalty, to prevent a certain state of things being allowed to continue without being aware of any means by which it can be stopped. Surely that cannot be right. You are not to send a man to prison for not preventing that which he cannot prevent. In the *Colney Hatch Case* (3) it was said that you cannot make an order to do a thing which is impossible. But I go further, and I entirely agree with this statement of Lord Justice *Cotton*, that before you can make

(1) 12 Ch. D. 102. (2) 12 Ch. D. 127.
(3) Law Rep. 4 Ch. 146.

an order directing a man to do something, for that is the effect of the injunction, you must be satisfied that he can do it. As I said before, I am not only not so satisfied, but upon the present evidence they cannot do it, and that is a sufficient ground.

There is one other ground that was not mentioned in the case of *Glossop* v. *Heston and Isleworth Local Board* (1), but which appears to me to be a very important ground, and that is, that in granting an injunction like this, which is a very delicate jurisdiction, the Court always looks at the balance of convenience. I agree that where there is injury to the plaintiff's property it is no answer to say, "We have invaded your property because it is more convenient to us." But where it is a continuance of a state of things which you find existing, and which only by the intervention of parliamentary powers you can stop, would it be right to grant an injunction when you cannot compel the exercise of the parliamentary power, the effect of which would be to cause a most frightful injury to the town of *Dorking?* I am now assuming that they could physically stop up the sewer, would it be right to order them to stop it up, leaving the town of *Dorking* to go undrained, and so cause disease probably, which would be utter destruction to the town, because there is a temporary injury to the Plaintiff? That is a consideration which the Court must not lose sight of when it is asked to grant a mandatory injunction. I am by no means prepared to say what the rights of the Plaintiff would be if the Defendants neglected to put in force their parliamentary powers, but I am prepared to say that the Court would find some remedy for him in that case.

It appears to me that this case is not fairly distinguishable from the case of *Glossop* v. *Heston and Isleworth Local Board*, and that the learned Judge in the Court below rightly considered himself bound by that case in coming to the conclusion that he did, and I think that we are equally bound, and therefore this appeal ought to be dismissed.

COTTON, L.J.:—

In this case I assume that the sewers are vested in the Defendants. It is not necessary in the view which I take to give any

(1) 12 Ch. D. 102.

C. A.
1882
ATTORNEY-GENERAL v. GUARDIANS OF POOR OF UNION OF DORKING.
Cotton, L.J.

opinion upon that point, but I assume that they are so vested. I assume also, as no doubt is the case, that the stream in which the Plaintiff is interested is in a very bad state, and is becoming daily worse, but does that entitle the Plaintiff to a decree and injunction against the Defendants?

Now the Defendants are doing nothing. They are not making any new sewer, nor are they active in exercising any power which they have under the Act of turning sewage, if they have the power, into any course different from that in which it previously went. In that state of things, in my opinion, the case is exactly the same in principle, although there are minute differences, as the case of *Glossop* v. *Heston and Isleworth Local Board* (1). I adhere to the opinion that was there expressed by me. All that has happened is that under the Act of Parliament these sewers have become vested in the Defendants, and under a section in the Act they are in this position, that they cannot close up these sewers without providing that which is necessary for the purpose of carrying away the sewage, nor can they close up any sewer so as to create a nuisance. Could it be for a moment said that closing up this sewer without providing another system of sewers would not cause a great nuisance to every householder who had previously drained into this sewer? It is not only so as regards those already drained into the brook, but under the Act of Parliament every householder has a right if his house is within a certain distance of this sewer of conducting his drain into it, and that being so no permission is required from the Defendants to enable any householder having a new or old house, to connect his drain with this sewer, and therefore they are not using their sewer for the purpose of carrying this drainage in the same way as a body or a person would be doing who permitted and allowed persons to turn their sewage into a sewer, when that person could not make any connection with the sewer except by the permission, or with the authority, of the person in whom the sewer was vested. In my opinion, therefore, it cannot be said that they are using this sewer for the purpose of conveying this sewage, which I assume causes a nuisance to the Plaintiff. It is said that this is not in accordance with the 17th section of the *Public Health Act*, 1875,

(1) 12 Ch. D. 92.

which says, "Nothing in this Act shall authorize any local authority to make or use any sewer, drain, or outfall for the purpose of conveying sewage or filthy water into any natural stream or watercourse." But that does not mean that they are to be considered as themselves using, either by themselves conveying, or by granting permission for sewage to be conveyed, into the stream by means of this sewer. The construction of the section is this, that the Act does not give authority to use or do anything so as to commit a nuisance; and, as was pointed out by Lord Justice *James*, and I think also by myself in our judgment in the *Glossop Case* (1), it means simply this, if you want, for the purpose of doing anything, to rely upon authority given by the Act, you must do that thing so as not to commit a nuisance. Here they are doing nothing, they are not constructing a new system of sewers. It was said that they are in fact using this sewer by allowing it to be used as part of the existing system of drainage which is vested in them. That is, they are not substituting a new system of sewerage, and in my opinion the mere fact that they have not substituted a new system of sewerage cannot make this the using of the sewer by them when it is used without any leave granted by them under the rights which are granted by the Act to householders. That being so, in my opinion they are doing no act, and the injunction ought not to be granted.

But it is said that they can prevent this being done, and therefore that an injunction ought to be granted for the purpose, as I understand the argument, of compelling them to exercise for the benefit of the Plaintiff those rights which they have of preventing the nuisance. It is said that they may do it in two ways; one is by bringing an action or taking proceedings under the powers of the Act against the persons who are in fact causing the nuisance by sending their sewage into the stream. The Master of the Rolls has dealt with this part of the case. Except where a person had bound himself by contract to bring an action (which of course is a different question) I never heard of anyone bringing an action against a person because that person did not bring an action which the plaintiff could bring himself, and if here there is a nuisance

(1) 12 Ch. D. 102.

C. A. 1882 — ATTORNEY-GENERAL v. GUARDIANS OF POOR OF UNION OF DORKING. — Cotton, L.J.

committed by the persons who are sending their sewage either *de novo* or continuing to send it into the sewer and thence into the stream, the Plaintiff can bring an action just as well as the Defendants, except that it is said he has not the same knowledge; but does the fact that the Defendants know of evidence which the Plaintiff does not, entitle the Plaintiff to bring an action against the Defendants for not bringing an action which the Plaintiff himself at law may bring, although he may have some difficulty in proving his case? I never heard of any such principle, and in my opinion it does not exist.

Then it was said (and that was I think really the principal argument), although the Defendants here are not actively doing anything which causes the nuisance, not doing anything which can be stopped by granting an injunction, they may indirectly be compelled to exercise the powers of an Act of Parliament which would be a benefit to the Plaintiff by preventing the sewage from coming into the stream. I repeat here what I said in the *Glossop Case* (1), that in my opinion if that is the object to be attained it ought to be done by an order directing the Defendants to exercise their powers, and not by way of injunction which is to have that effect indirectly. But, independently of that, there has been no default, as the Master of the Rolls has pointed out, on the part of the Defendants in the exercise of their powers. They have been trying, but they cannot do it. There is this fatal objection to what is asked for by the Plaintiff. In my opinion it would not be right to grant an injunction to restrain the Defendants from allowing this sewage to come into the stream when it does not appear that there are any means under the authority given by the Act of Parliament by which they can divert the sewage from the stream. It is said that this is contrary to the decided cases. In my opinion it is contrary to none of them. In those cases which have been referred to, *Attorney-General* v. *Mayor of Birmingham* (2), *Goldsmid* v. *Tunbridge Wells Improvement Commissioners* (3), and other cases which are too numerous to mention, the Defendants who were restrained had done something actively to turn the sewage into the stream or on to the land of the parties

(1) 12 Ch. D. 102. (2) 4 K. & J. 528.
(3) Law Rep. 1 Ch. 349.

C. A.
1882
ATTORNEY-GENERAL v. GUARDIANS OF POOR OF UNION OF DORKING.
Cotton, L.J.

complaining. In those cases the Act of Parliament had given them power to get rid of their sewage provided they could do so without committing a nuisance, and if they could not do it without committing a nuisance the Act of Parliament did not authorize them to do it, and they were in the same position as individuals who were doing a wrong to their neighbour without any parliamentary authority. Here the Defendants are doing nothing, and they are sought to be compelled to exercise the powers of the Act when it does not appear that the exercise of the powers would prevent the injury or loss to the Plaintiff of which he complained. In my opinion if there were no other that would be a fatal objection to the granting of the injunction for the indirect purpose which the Plaintiff here tries to obtain by his application.

LINDLEY, L.J.:—

I am of the same opinion. I do not see how this case can be distinguished from *Glossop* v. *Heston and Isleworth Local Board* (1).

Solicitors for Plaintiff: *Walters, Deverell, & Walters.*

Solicitors for the Defendants: *Duncan, Warren, & Gardner,* agents for *Hart, Hart, & Marten, Dorking.*

M. W.

In re COOPER.
COOPER *v.* VESEY.

[1880 C. 41.]

C. A.
1881
KAY, J.
Nov. 25, 26, 28, 30.
C. A.
1882
March 30, 31.

Forged Deed — Fraud — Personation—Purchaser for Value without Notice—Middlesex Registry Act (7 *Anne, c.* 20) [*Revised Ed. Statutes, vol. ii. p.* 200]*—Unregistered Will—Conveyance by Heir-at-law—Order for delivery up of Title Deeds—Execution of Deed—Presumption of Knowledge of Contents—Costs, Appeal for—Parties—Trustee and Cestui que Trust—Judicature Act,* 1873, *s.* 49*—Rules of Court,* 1875, *Order* XVI., *r.* 7*—Order* LV.

A son who was heir-at-law to his father, who was one of the executors and trustees of his father's will, though he had not proved the will, and whose Christian names and description were identical with those of his father, after his father's death, executed mortgages of freehold and leasehold

(1) 12 Ch. D. 102.

C. A.
1882
In re COOPER.
COOPER *v.* VESEY.

property of the father and applied the mortgage money to his own purposes. He handed over the title deeds to the mortgagees. The transaction took place without the knowledge of his mother and sister, who were co-trustees and co-executrixes with him, and who had proved the will. The will had not been registered in the *Middlesex* Registry, though the property was situate in that county. The mortgage deeds were registered. They purported to be executed by the absolute owner of the property, and the solicitor who acted for both parties believed the son to be the absolute owner. The son told him nothing about the father's will. The solicitor searched the *Middlesex* Registry. The son took a beneficial interest under the trusts of the father's will. After the son's death the fraud was discovered, and the mother and sister, as trustees of the father's will, brought an action against the mortgagees, claiming a declaration that the mortgages were void against them, and delivery up of the title deeds. The other beneficiaries under the will were made Defendants :—

Held (by *Kay*, J., and the Court of Appeal), that the son in executing the mortgage deeds was personating his father; that the deeds were forgeries and passed nothing to the mortgagees, except the son's beneficial interest under the father's will; and that the mortgagees could obtain no title by virtue of the *Middlesex Registry Act:*

Held also, that the mortgagees must deliver up the title deeds to the Plaintiffs:

Held, by *Kay*, J., that the mortgagees must pay the Plaintiffs' costs of the action, and also the costs of the co-Defendants:

Held, by the Court of Appeal, that, inasmuch as, by virtue of rule 7 of Order XVI., trustees may sue on behalf of their *cestuis que trust*, that beneficiaries ought not to have been made parties to the action. Consequently, the order that the mortgagees should pay their costs could be appealed from, and that order was discharged.

Since the *Judicature Act* the Chancery Division has jurisdiction on the application of the legal owner of title deeds to order them to be delivered up by a purchaser for value without notice.

McLeod v. *Drummond* (1) distinguished.

Per Lindley, L.J.:—The son could have been convicted of forgery by reason of his executing the mortgage deeds.

Per Jessel, M.R.:—In the absence of evidence to the contrary there is a legal presumption that a man knows the contents of a deed which he executes.

THOMAS FREDERICK COOPER, who carried on the business of a watchmaker at No. 6, *Calthorpe Street*, *Gray's Inn Road*, by his will, dated the 10th of October, 1861, appointed his wife, *Ann Patience Cooper*, and his daughter, *Anne Victoria Cooper*, executrixes and trustees thereof, and also his sons, *Thomas Frederick Cooper*, the younger, and *Charles Samuel Cooper*, to be exe-

(1) 14 Ves. 353; 17 Ves. 152.

cutors and trustees thereof, when they should attain their respective ages of twenty-one years. And, after giving a legacy of £150 to his wife, he devised and bequeathed all his estate and effects, real and personal, to his said wife and daughter and his said two sons, when they attained their respective ages of twenty-one years, their heirs, executors, administrators, and assigns, upon certain trusts therein declared for the benefit of his wife and children. And he thereby declared that it was his wish that his son, *Thomas Frederick Cooper*, should succeed him in his business of a watchmaker, and that, in the event of his own death before the son attained the age of twenty-one years, the son should carry on the business for the benefit of the testator's estate without remuneration, until he should attain twenty-one, and that he should also after attaining twenty-one carry on the business for three years for the benefit of the testator's estate, and receive £150 a year out of it for his services in carrying on the same; but should the business not produce £150 per annum, the son should then have the business for himself. And at the expiration of the three years the testator gave to the son, *T. F. Cooper*, the goodwill of the business for his own use and benefit.

The testator died on the 9th of March, 1863. He left surviving him his wife and nine children, including the daughter and the two sons, who were appointed executors and trustees. *T. F. Cooper*, the son, did not attain twenty-one until the 9th of December, 1863. The will was proved on the 24th of April, 1863, by the widow and the daughter alone, power being reserved to the two sons to prove thereunder. This they never did. The testator died seised of some freehold houses and possessed of some leasehold houses, all of which were situated in *Middlesex*, but the will was not registered in the *Middlesex* Registry until the 23rd of February, 1880. After the death of the testator the son, *T. F. Cooper*, carried on his father's business at the place at which the father had carried it on, and when he attained twenty-one he was permitted by his mother and sister to have the entire management of his father's trust estate.

In January, 1866, he was desirous of becoming a director of a company called the *Carnarvonshire Slate Company*, of which his father had been a director, and his mother and sister consented

C. A. 1882 — *In re* COOPER. COOPER *v.* VESEY.

that 190 shares in the company, part of the father's estate, should be transferred into his name in order to qualify him, and on the 31st of January, 1866, the following memorandum was signed by him:—

"Memorandum of agreement made and entered into this 31st of January, 1866, between *T. F. Cooper*, of No. 6, *Calthorpe Street, Gray's Inn Road*, of the one part, and *Ann Patience Cooper* and *Anne Victoria Cooper* of the other part, witnesseth that the said *T. F. Cooper*, in consideration of 190 shares in the *Carnarvonshire Slate Company* being made over to him, in order to qualify him for a director in the said company, hereby agrees that all profits and dividends that may become due to the said shares shall be accounted for to the said *A. P. Cooper* and *A. V. Cooper*, and the said *T. F. Cooper* further agrees to remake over the said shares when called upon."

In July, 1866, *T. F. Cooper* was desirous of purchasing from a Miss *Tyrrell* some more shares and some debentures of the company, and his mother and sister consented to his employing £1200, part of the testator's trust moneys, for this purpose, and the following memorandum was signed by him:—

"Memorandum made the 5th day of July, 1866, between the executors of the late *T. F. Cooper*, of No. 6, *Calthorpe Street, Gray's Inn Road*, of the one part, and *T. F. Cooper*, junior, of the other part. With a view to enable him to purchase a portion of Miss *Tyrrell's* shares and debentures in the *Carnarvonshire Slate Company, Limited*, and the prosecution of the works at the quarries, we do hereby permit him to draw the sum of £1200 out of the trust moneys of the estate of the late *T. F. Cooper*, in sums when he may require it, such sums to include the £651 already drawn out by him, the said sums to be at 5 per cent. interest from the date they are drawn until repaid or the termination of the trust. The said *T. F. Cooper* hereby agrees that the whole of his interest in the said trust funds shall be answerable for the sums drawn, and further agrees to retransfer the £1900 (190 shares), which have been transferred by the executors to him, to the executors, as soon as the division of Miss *Tyrrell's* purchase takes place. The said *T. F. Cooper*, junior, further agrees that any loss that may be

sustained by the sale of property necessary to provide the required funds will be borne by himself, provided the same would be necessary to repurchase the same securities when further funds are ready for disposal." This document was in the son's own handwriting.

In the year 1874 *T. F. Cooper*, the son, was in want of money to enable him to pay calls on some allotments of new shares in the slate company. He did not inform his mother and sister of this, but he raised money in the following way:—The title deeds of the testator's freehold and leasehold houses were kept in a locked box at the testator's bankers, where they had been deposited for safe custody in his lifetime. The key of that box was after the testator's death kept in a safe in the house in which the son, *T. F. Cooper*, lived with his mother. He possessed himself of this key and took the title deeds from the box at the bankers without any communication with his mother or sister and without their consent or knowledge. He obtained an introduction to Mr. *Lyon*, a partner in a firm of *Newman & Lyon*, who were solicitors carrying on business in the *Temple*, to whom he was previously a stranger. He took the title deeds to Mr. *Lyon* and told him that he wanted to raise £5000 upon them. He said nothing about his father's death or his father's will, and Mr. *Lyon* (so far as appeared) believed him to be the *T. F. Cooper* whom the deeds shewed to be entitled to the property comprised in them. Among the documents was the abstract of title to the freehold property which had been used on the occasion of the purchase by the father in 1853. Mr. *Lyon* searched the *Middlesex* Registry, and finding no record there of any dealing with the property subsequent to the conveyances and leases to *T. F. Cooper*, the father, he consented to lend £3500. Two mortgage deeds were accordingly prepared, the one for £2000 to Mr. *Lyon* himself of the freehold houses and some of the leasehold houses, and the other for £1500 to a Miss *Alston* (a client of Mr. *Lyon*) of the remainder of the leasehold houses, and both the deeds were executed by *T. F. Cooper*, the son, as mortgagor. The £3500 was paid to him, and was applied by him to his own purposes. The title deeds were handed over to the respective mortgagees. The

C. A. 1882 — *In re* COOPER. COOPER *v.* VESEY.

mortgage deeds were registered in *Middlesex* shortly after their execution. The mortgagees had no notice of the will or of the death of *T. F. Cooper*, the father. Neither the mother nor the sister, who were trustees of the will, nor any of the other persons entitled under the trusts had any notice of the mortgages until after the death of *T. F. Cooper*, the son, on the 8th of January, 1880.

The mortgage deeds were both dated on the 26th of June, 1874. The first deed, which comprised the freehold houses and some of the leasehold houses, was expressed to be made between *Thomas Frederick Cooper*, of No. 6, *Calthorpe Street, Gray's Inn Road*, watchmaker, of the one part, and *Thomas Lyon*, of the other part. It contained a recital that "the said *T. F. Cooper* is seised for an estate of inheritance in fee simple, free from incumbrances, of and in the freehold hereditaments described in the first schedule hereto," and that "the said *T. F. Cooper* is also possessed of the several leasehold premises described in the second schedule hereto for the terms therein mentioned." And by the deed the said *T. F. Cooper* purported to grant the freehold hereditaments described in the first schedule and all his estate and interest therein to *Lyon*, in fee, and to demise to *Lyon* the leasehold hereditaments described in the second schedule and comprised in the several indentures of lease therein mentioned, to hold the same to *Lyon* for all the unexpired residues of the said several terms of years respectively (except the last day of each term), subject as to all the properties to redemption as therein mentioned. In the first schedule the parcels of the freehold properties were stated. In the second schedule the leasehold properties were described, and it was also stated that they were, by two several indentures of lease, dated the 24th of July, 1851, "demised unto the said *T. F. Cooper*, his executors, administrators, and assigns," for two several terms of eighty-one years, from the 24th of June, 1851. The leasehold properties comprised in the second mortgage deed of the 26th of June, 1874, were described in a similar way in a schedule to that deed.

After the death of *T. F. Cooper*, the son, the fraud which he had committed was discovered, and this action was then com-

menced by the testator's widow and daughter against the persons in whom the mortgages were then vested. *Lyon* had on the 8th of August, 1874, transferred the mortgage debt of £2000 to *Eliza Nicholson*, but he had not transferred the security to her. She was a Defendant. He died in December, 1879, and his executors and devisees of estates vested in him by way of mortgage were also Defendants. The Defendant *Vesey* and three other Defendants were transferees of Miss *Alston's* mortgage. Two persons named *Pearce* and *Pavia*, who claimed an interest in parts of the leasehold property through *T. F. Cooper*, the son, were made Defendants, and the beneficiaries under the testator's will were also made Defendants.

The Plaintiffs claimed a declaration that they were entitled, as devisees of the real estate and as executrixes of the will of *T. F. Cooper* the father, to the freehold and leasehold premises comprised in the mortgages, to have the mortgage deeds set aside as against them, and the title deeds of the property delivered up, and other consequential relief.

The mortgagees by their statement of defence relied on the facts that *T. F. Cooper*, the son, was the eldest son and heir-at-law and executor to his father, and that the will was not registered, and they insisted that the registration of the mortgage deeds gave them a good title to the mortgaged property. They said that they were purchasers for value without notice, and they claimed at any rate to retain the title deeds.

Mr. *C. H. Vincent*, who was conveyancing clerk to Messrs. *Newman & Lyon* at the time when the mortgages were prepared and executed, and who attested the execution by *T. F. Cooper*, was examined as a witness at the trial. He stated that he prepared the mortgage deeds by the direction of Mr. *Lyon*, and that when they were executed he took the usual course in the office as to explaining them to *T. F. Cooper*, the son. He said that he should have said from the appearance of the son that he was then between forty and fifty years of age. There was nothing in his appearance to lead him to suppose that he was other than the person named in the deeds which had been handed to him, and he was under the impression that he was the person entitled to the deeds. Another clerk in the office, who saw *T. F. Cooper*, the son, at the

C. A. 1882

In re COOPER. COOPER *v.* VESEY.

time of the mortgage transactions, said that he thought him to be about forty-five years of age.

The action came on to be heard before Mr. Justice *Kay* on the 25th of November, 1881.

Rigby, Q.C., and *Levett*, for the Plaintiffs:—

Our claim is against four classes of defendants: the first two are those who represent the mortgagees of the freehold and leasehold property, the third class represent the person who purchased a leasehold house and paid a portion of the purchase-money, and the fourth is an equitable mortgagee who had possession of the title deeds of part of the estate as security for a loan. These several transactions were entered into by *T. F. Cooper* the younger for his own benefit, and without the knowledge of the Plaintiffs, who were the persons entitled. *T. F. Cooper*, the son, got possession of the title deeds without our knowledge, and used them in fraud of our rights, and mortgaged the property as if he were the absolute owner. The mortgage deeds recite that *T. F. Cooper*, the mortgagor, was the owner, therefore the son must have represented himself to be *T. F. Cooper*, his father. We have evidence that he negotiated the loans upon the mortgages in the character of his father, and he therefore forged his father's name. It is true that he was heir-at-law to his father, but he was only entitled, under the will, to a portion of the freehold property, and he was appointed one of the executors, and was entitled to his share of the personal estate, but he never proved the will, and was not entitled to act in the trusts. It is evident he knew this from the fact of his having been party to an agreement under which he acquired from the acting trustees and executors of the will a portion of the testator's estate, which he was to hold for the benefit of those interested under the will. If it is set up against us that he acted as the heir or executor of the testator, then we say that the mortgage deeds distinctly represent him as the father, the testator, the owner of the estate, and if he executed the deeds as owner, then the deeds are invalid because they were not executed by the right person. If he had acted as heir or as executor that would have been set out in the mortgage deeds. The mortgagees were the parties to blame for not making inquiries and in not

obtaining evidence of identity, and seeing that the mortgagor was the person in whom the property was vested. They did not ask for an abstract of title, or they must have discovered who was the mortgagor. The conveyance of the freeholds to the testator was in November, 1853, and the assignment of the leaseholds in July, 1851. At that period *T. F. Cooper* the son was in his ninth year; he, therefore, could not be the person the mortgagees were dealing with. There was consequently abundant ground for putting them upon inquiry. The defendants also claim that the will not being registered in *Middlesex* they got a good title to the real estate from the borrower as heir-at-law, and to the leaseholds as executor of his father, and that, being in fact heir, and the mortgagees being purchasers for value without notice of the will, the Plaintiffs have no case, but the answer to that is that the mortgagees never dealt with the borrower as heir, but as the real owner. We contend that his signature was a forgery of the testator's name, and the conveyance was valueless, and passed nothing. As to the right of *Henry Pearce*, he had agreed to purchase the house from a person having no title to sell, and as to the last Defendant he had the means of ascertaining all the necessary information about the family, and having neglected to do so, he can have no right against innocent persons legally interested in the property. Neither did the mortgagees deal with *T. F. Cooper*, the son, as executor. An executor may, no doubt, do many acts without proving, but then a subsequent probate must be shewn: *Williams* on Executors (1); *Webster* v. *Spencer* (2); but here the Defendants seek to make the title of an executor who has not proved higher than that of one who has. Then it is said, he was the agent of the Plaintiffs, but he had no power as agent, and none has been shewn: *Sneesby* v. *Thorne* (3). It is true that the son carried on the business of the father, but if, in so doing, he contracted debts in his own name, purporting to act on behalf of his father's business or as his executor, that would not give a creditor any right against the testator's assets: *Pillgrem* v. *Pillgrem* (4).

Daniel Jones, for the other beneficiaries under the will.

(1) 6th Ed. p. 291.
(2) 3 B. & A. 360.
(3) 7 D. M. & G. 399.
(4) 18 Ch. D. 93.

C. A. 1882

In re COOPER. COOPER *v.* VESEY.

Marriott, Q.C., *Whitehorne*, Q.C., and *Wolstenholme*, for the mortgagees:—

If the son, *T. F. Cooper*, committed a fraud, the mortgagees are not the parties who ought to suffer from his acts. He was heir-at-law of his father, and he was appointed an executor though he had not proved; he was the manager carrying on his father's business under a direction in the will, he was the acting business man, and was trusted as the manager by his family. The deeds were in his possession, which was a very natural thing, considering that he acted in all matters as the agent of the trustees, and his name was the same as his father's. There is evidence, also, that he looked much older than he really was, therefore, under the circumstances, the solicitor for the mortgagees was justified in believing him to be the owner of the property. Then the executors were themselves to blame in not proving the will and having it registered, as provided by the statute 7 Anne, c. 20, s. 1. *T. F. Cooper*, the son, acted as the agent of the family. The impression on his mind must have been that he had a right to act on behalf of his brothers and sisters. He acted as a person authorized to raise money on the deeds, without reference to what title he might actually have. The utmost that can be said is that he acted under a mistake, and it cannot be that he intended to commit a forgery. He meant to convey all the interest he himself had, not what his father had, and he probably did not know precisely what interest he had. As heir-at-law of his father he had a portion of the legal estate vested in him, and that portion would pass by the conveyance, so also would the share to which he was entitled in the leasehold property since he was one of the executors appointed by the will: *Pilcher* v. *Rawlins* (1). And supposing he purported to convey the fee simple, he would be estopped from denying that he had conveyed the smaller interest which he actually had in the property: *Boursot* v. *Savage* (2). Assuming that the son executed the deeds legitimately, their effect would be (as to the freeholds) to sever the joint tenancy and to pass one-fourth of the legal interest; and, as the will was not registered under the Act, to pass the whole beneficial interest, and there would be the same result as to the leaseholds. To affect a registered deed by notice

(1) Law Rep. 7 Ch. 259. (2) Law Rep. 2 Eq. 134.

of a prior unregistered deed, actual notice must be clearly proved amounting to fraud: *Wyatt* v. *Barwell* (1); *Chadwick* v. *Turner* (2); *Waldy* v. *Gray* (3). In *Pillgrem* v. *Pillgrem* (4) there was no conveyance of the legal estate, it was only a case of deposit.

The mortgagees were purchasers for value without notice of the will. There was nothing to raise any suspicion in the mind of the mortgagees. They were justified in relying on the statements made by *T. F. Cooper*, the son, who was the ostensible agent for his family, and they were not bound to inquire further: *Dawson* v. *Prince* (5); *Doe* v. *Allsop* (6); *Jones* v. *Powles* (7). The non-production of the title deeds is not in all cases to be considered a negligent act. There is no inflexible rule of law upon the subject, but the necessity must depend upon circumstances: *Agra Bank* v. *Barry* (8). There was nothing in this case to raise suspicion in the mind of the solicitor who prepared the deeds.

Higgins, Q.C., and *Warmington*, *Fischer*, Q.C., and *Seeley*, for the other Defendants, between whom and the Plaintiffs a consent order was arranged.

1881. Nov. 30. KAY, J., after stating the facts, continued:—

With reference to the document of the 31st of January, 1866, being the memorandum of agreement by which the 190 shares in the *Carnarvonshire Slate Company* were made over to *T. F. Cooper*, the son, by his mother *Ann Patience Cooper*, and his sister *Ann Victoria Cooper*, it seems to me a very clear recognition of the position of the mother and sister as trustees, making over to him the shares which had belonged to his father and were part of the trust estate, and the subsequent memorandum of agreement, dated the 5th of July, 1866, by which *T. F. Cooper*, the son, was permitted by his mother and sister to draw the sum of £1200 out of the trust moneys of the estate of his father, shews also that he recognised the Plaintiffs as being the executors of the will, and treated himself as not being an executor, and as a matter of fact

(1) 19 Ves. 435.
(2) Law Rep. 1 Ch. 310.
(3) Law Rep. 20 Eq. 238.
(4) 18 Ch. D. 93.
(5) 2 De G. & J. 41.
(6) 5 B. & A. 142.
(7) 3 My. & K. 581.
(8) Law Rep. 7 H. L. 135.

C. A. 1882 *In re* COOPER. COOPER *v.* VESEY. Kay, J.

he had not proved the will of his father. That document further shews that he was quite aware he must have a special authority to draw moneys out of the trust funds for his own purposes. It clearly is not any authority to him to mortgage the real or leasehold property, but it is to my mind convincing proof that he knew that, in order to do so, he must have the express authority of the trustees at any rate.

It has been argued for the Defendants, the mortgagees,—

1. That the mortgage deeds are valid.

2. That the mortgagees had no constructive notice of the Plaintiff's rights.

3. That the will not having been registered, it was void as to the freeholds against the deeds which conveyed the fee simple which *T. F. Cooper*, the son, took as heir of his father.

4. That as to the leaseholds he was one of the executors though he had not proved, and that his demise of the leaseholds in the mortgages was good.

5. That the title deeds at any rate cannot be taken from the mortgagees.

With respect to the first question whether the mortgage deeds are valid, it is important to consider the terms of those deeds. [His Lordship read the recitals in the mortgage to Mr. *Lyon*, and referred to the statements in the schedule and continued.] Therefore there is in that schedule a distinct statement that the *Thomas Frederick Cooper* to whom the demise was made was the *Thomas Frederick Cooper* who was a party to that deed. I need not read the second deed at length, which is the mortgage to Miss *Alston*. It contains in the schedule an identical representation that the *Thomas Frederick Cooper* who is the mortgagor in that deed was the *Thomas Frederick Cooper* to whom the leases were originally made.

From these deeds it appears that *T. F. Cooper*, the son, mortgaged the property and executed the deeds in the character of his father, *T. F. Cooper*, and not in his own name or character at all. If it is competent and necessary for me to investigate the transaction further, every circumstance confirms this view. The title deeds which he took to the solicitors are deeds which, both as to the freehold and leasehold properties, shew a good title in

T. F. Cooper the father, and in him only. The last conveyance of the freeholds is dated the 7th of November, 1853, and is a conveyance to the father in fee simple. The leasehold properties as stated in the schedules to the mortgages were by deeds dated in 1851, 1852, and 1854, leased or agreed to be leased to the father.

Among the documents taken to the solicitors by *T. F. Cooper*, the son, was an abstract of the title to the freehold property used, as appears by the endorsement, upon the purchase by the father in 1853. The Defendants have been at pains to prove by photographs of the son, and by the evidence of the clerks of Messrs. *Newman & Lyon* that the son looked old enough to have attained his majority in 1850. Mr. *Vincent*, one of such clerks (now a solicitor on his own account) who prepared these mortgage deeds, says he was under the impression that the party conveying was the person to whom the freeholds and leaseholds had been assured by the produced deeds. The mortgages were not for old debts, but for money advanced at the time. It is impossible to doubt that *T. F. Cooper*, the son, deliberately and designedly suppressed the facts of his father being dead, and of his being only interested in a small share of the property under the will, and by conduct if not in words represented himself to be the individual to whom the property had been conveyed and assigned as shewn in the deeds he produced.

In short he personated his father throughout this transaction, and executed the deeds in that character, signing not his own name but the name of his father.

I think some confusion of thought and possibly of argument has arisen from the circumstance that his names and those of his father were the same. But obviously the true mode of determining the effect in law of what has been done is to suppose them different. If *A.* personating *B.* executes a deed in the name of *B.* purporting to convey *B.'s* property, no right or interest can possibly pass by such an instrument. It is not a deed. It makes no difference in law that *A.* had the same name as *B.* if the false personation is established ; still the instrument is not a deed, and that plea would be a complete answer by *B.*, or any one claiming through him.

C. A. 1882 *In re* COOPER. COOPER *v.* VESEY. Kay, J.

But it has been suggested that this was not really the case here. The son, it is said, misapprehended his powers. He took the title deeds to Messrs. *Newman & Lyon* to raise money on them. Mortgages were prepared but they were not read over by him. He executed them being unaware of the misapprehension which existed on the part of the mortgagees. It was a mere mistake. This is a theory only. There is no evidence to support it. But if it were proved, I doubt if it would help the Defendants. These deeds were not prepared for the son to execute in his own character, but for execution by the father, who was supposed to be a living person; and the execution by the son in his own character of a deed prepared for and intended to be executed by the father cannot be a transaction that could bind the interests of third parties claiming through the father. However, I need not consider the consequences of such a theory. To adopt it against the very terms of the deeds, against all the evidence and probabilities of the case, seems to me quite impossible.

The result is that the mortgage deeds must be declared void as between the persons (other than *T. F. Cooper*, the son) claiming under the will and the mortgagees.

This disposes of the case, and none of the other questions argued arise except that I must say a few words as to whether any right can be founded by the mortgagees on their possession of the title deeds. Now I am not able to see how *T. F. Cooper*, the son, ever had the lawful possession of those deeds. Treating him as a trustee the deeds were never entrusted to him by his co-trustees. He obtained possession of them surreptitiously and by something very like theft, even if his position as one of the trustees prevented its being absolutely a theft. Besides this the deeds were deposited by him in the assumed character of his father and were so received by the mortgagees, and as against the Plaintiffs, the real owners, I do not see how any other title in the depositor can now be set up.

For these reasons I think the mortgagees could have no claim to the deeds even in equity. But I am rightly reminded that I am not administering equity only. The third paragraph of the prayer asks for delivery up of these deeds. If there could be any ground for the Defendants urging a Court of Equity to leave the

Plaintiffs to their legal remedy as to the deeds, I am to give that legal remedy also. I must therefore order that the title deeds should be delivered up.

The receiver must pass his accounts and hand over the property to the claimants. The representatives of *T. F. Cooper*, the son, are not before me, and I cannot deal with any question as to the effect of this transaction by estoppel or otherwise as against them. But this seems a question which cannot really arise, because under the memorandum of the 5th of July, 1866, there is a prior charge in favour of the Plaintiffs upon that equitable interest which will probably exhaust it.

The case is a hard one upon the mortgagees, but the loss must be theirs, and I cannot relieve them from the costs of this action, which I must direct them to pay to the Plaintiffs and to the co-Defendants who are in the same interest as the Plaintiffs.

T. W. G.

C. A.

The mortgagees appealed from the whole of the order. The appeal was heard on the 30th and 31st of March, 1882.

Marriott, Q.C., *Whitehorne*, Q.C., and *Wolstenholme*, for the Appellants:—

We say that the son intended to execute this deed on his own behalf. His doing so may have been a breach of trust, but that is no concern of ours, for we were not privy to it. *T. F. Cooper* managed the estate, and all the agreements with tenants were made in his name. He was heir-at-law. The will was not registered, but our mortgage was registered at once, so we have a good title. The only circumstance on the deeds at all supporting the judgment is the occurrence of the words "the said" in the schedule.

[JESSEL, M.R.:—Did he not sign his own name, intending it to be taken for the name of his father?

COTTON, L.J.:—Is not the question whether he did not when he signed the deed intend to pass it off as the deed of his father?]

As one of several executors he could effectually mortgage the leaseholds: *Coote* on Mortgages by *Mackeson* (1).

(1) Page 282.

C. A. 1882

In re COOPER.

COOPER *v.* VESEY.

[JESSEL, M.R.:—Can a mortgagee thus get a good title unless he is dealing with the executors in that character?]

He can, according to the principle of *Pilcher* v. *Rawlins* (1).

[JESSEL, M.R., referred to *Oceanic Steam Navigation Company* v. *Sutherberry* (2).]

The conveyance by the heir-at-law gives us a good title under the *Middlesex Registry Act* (7 Anne, c. 20).

[JESSEL, M.R.:—Was not notice of the possession of the tenants notice of the landlord's title?]

If it was it was only constructive notice, and constructive notice is not enough: *Wyatt* v. *Barwell* (3); *Chadwick* v. *Turner* (4). Actual notice is required, and there was none, nor any negligence on the part of the mortgagee. A purchaser is not bound to make any inquiry as to the existence of unregistered interests: *per* Lord *Selborne*, *Agra Bank* v. *Barry* (5). A question has been raised whether the *Registry Act* applies to leaseholds, but the 17th section, which excludes from it leaseholds at a rack-rent, shews that it does. The legal estate acquired without notice gives us a benefit of which we cannot be deprived: *Pilcher* v. *Rawlins*. The devisees will only suffer through their own negligence in not registering the will. We admit that if the deed is to be treated as a forgery such that *non est factum* could be successfully pleaded, as in *Hare* v. *London and North Western Railway Company* (6), we must fail; but that is not the case. There is no question as to the credibility of the witnesses, the only question is as to the inferences to be drawn from the facts proved. The only facts which can be urged against us are the words "the said" in the schedule, and letters in which the property is spoken of as being the son's.

[JESSEL, M.R.:—And this further fact that the son took the deeds to the mortgagees as being his title.]

He took them as the title deeds of property with which he had power to deal.

(1) Law Rep. 7 Ch. 259.
(2) 16 Ch. D. 236.
(3) 19 Ves. 435.
(4) Law Rep. 1 Ch. 310.
(5) Law Rep. 7 H. L. 135, 157.
(6) Joh. 722.

[COTTON, L.J.:—If a person takes to an intending purchaser deeds shewing that the property belongs to *A. B.*, and a deed of conveyance by *A. B.* is prepared, and is then executed by the person who takes the deeds, is not that *primâ facie* proof that he represented himself to be *A. B.*?]

It raises a suspicion that he did, but the question is whether it is proved that he intended to deceive.

[JESSEL, M.R.:—Can it be supposed that he omitted to say that he was one of several trustees without an intention to deceive?]

T. F. Cooper did not get any personal benefit from this transaction, the money went into an undertaking in which the father had invested money, and the son considered that by putting in more capital the concern would be kept on foot and the whole money invested would be saved. A person is not likely to commit a forgery without a strong personal motive, and this ought to weigh with the Court in determining whether there was forgery. At any rate, the deposit of the title deeds was made by one of the legal owners, and the Court will not interfere with the legal right by ordering the deeds to be delivered up: *M'Leod* v. *Drummond* (1). If the mortgagees are to suffer they will suffer without any fault of their own. Their solicitor took every precaution. There is evidence that the son's appearance was that of a man old enough to have been of age at the time when the conveyances were made to his father. The mischief has been caused by the negligence of the mother and the daughter in not registering the father's will.

Rigby, Q.C., and *Levett*, for the Plaintiffs, were not heard.

Daniel Jones, for the other beneficiaries.

The other Defendants did not appear.

JESSEL, M.R., after stating the facts, continued:—

The real question is, did the son personate the father in signing the name *Thomas Frederick Cooper* to these mortgage deeds? If he did, the signature is a forgery. Now the evidence, to my mind, is conclusive that he did, although it is only inferential.

(1) 14 Ves. 353; 17 Ves. 152.

C. A. 1882 *In re* COOPER. COOPER v. VESEY. Jessel, M.R.

In the first place, when he took the title deeds to Mr. *Lyon* he must have represented them as being his title deeds, and Mr. *Lyon* must have accepted them as such. In the next place, Mr. *Lyon* must have asked him whether he had incumbered the property, and must have got a negative answer. There again the son must have known, he not having said anything about his father's will, that Mr. *Lyon* was treating him as the owner of the property. It is impossible, as it appears to me, in the absence of evidence to the contrary to avoid that inference. Again, when we look at the contents of the freehold deed it must have been manifest to any one who read it, or to whom it was properly explained, that it purported to be the deed of the father. It begins by a recital that *Thomas Frederick Cooper* is seised of an estate of inheritance in fee simple free from incumbrances of and in the freehold hereditaments described in the first schedule hereto. Of course, that was not true of *Thomas Frederick Cooper* the son. If he read that he must have known it was not true, and that it could not apply to him. Then, when we look at the description of the leaseholds, the inference is quite as strong as in the case of the freeholds, because the leaseholds are referred to as having been by a deed of 1851 demised unto *Thomas Frederick Cooper*. Of course, that is the father, and anybody who read that, or to whom it was properly explained, must have known that it was the father and not the son who was supposed to be conveying. There is also the indorsement on the deed, "Mortgage of freehold and leasehold messuages and properties in the parish of *St. Pancras*, for securing £2000 and interest." The suggestion on the other side is this: It is said that *Thomas Frederick Cooper* was an ignorant man (there is no proof of his ignorance), and believed that he was conveying his own interest in the property. There is no proof of such a belief. We are to assume that the deed was neither read over to him nor sufficiently explained to him. As to that the solicitor's clerk who ought to have explained it is called, but his evidence is so unsatisfactory that I cannot tell whether he explained it properly or not. It is a long time ago, and the man cannot recollect, and cannot be expected to recollect, exactly what he did. But still one cannot say from his evidence that it is proved that the deed was explained to the son. But there is a

presumption of law that when a man signs a deed he is acquainted with its contents, and that presumption is not rebutted by a mere assertion without evidence in support of it. Indeed, looking at the surrounding circumstances, and not forgetting the indorsement, I am satisfied—not, indeed, that the son actually knew the words of the deed—but that he did know that Mr. *Lyon* believed that he was taking a conveyance from the purchaser of the property, and that he knew that that purchaser was his father and not himself. In other words, I agree in the conclusion of Mr. Justice *Kay* that the son did personate, and that he intended to personate, his father, and that consequently the mortgage deeds are forgeries. For these reasons I think that the appeal ought to be dismissed.

COTTON, L.J.:—

The question upon which this case turns is a very curious one. *Thomas Frederick Cooper*, the son, signed, sealed, and delivered a parchment, and the question is whether, signing, as he did, his own name, the deed is a forged deed. When one looks at it, it is clear that it purports to be, not the deed of *Thomas Frederick Cooper*, the son, who signed, sealed and delivered it, but the deed of his father, who bore the same name and had the same description. And the question we have to consider is, whether, at the time when the son signed his name and sealed and delivered the parchment, he intended to represent that it would thereby become the deed of his father. In my opinion, although I cannot but regret having to come to such a conclusion, we can on the facts before us come to no other conclusion. Now this is what was done. The property having been the father's, and having been dealt with by his will (there was both freehold and leasehold property), the son takes to the solicitor from whom he is going to borrow money an abstract of title antecedent to the conveyances to his father, and also the deeds of conveyances to his father, but no subsequent muniments of title. He does not take his father's will, and he makes no statement about the death of his father, and takes no document which shews it or shews that he was the heir-at-law of his father. When he took those documents to the solicitor, in my opinion, the reasonable

C. A. 1882 *In re* COOPER. COOPER *v.* VESEY. Cotton, L.J.

conclusion which any one would draw from the fact that a person of the name of *Thomas Frederick Cooper* was bringing abstracts and deeds shewing a title in a *Thomas Frederick Cooper* of the same description would be that the person claiming title to the property was the *Thomas Frederick Cooper* in whom a title was shewn by the instruments so produced. It has often been said, and I repeat it, that a man who does that from which the only reasonable conclusion is that a certain state of things exists, must be taken under ordinary circumstances to mean and intend to represent that that state of things does in fact exist. So here I cannot but come to the conclusion that the son, when he took those documents of title to the solicitor for the purpose of borrowing money upon them, did intend him to understand that his title was that of the *Thomas Frederick Cooper* in whom a title was shewn by those documents. He undoubtedly knew of his father's will. He also, as is shewn by those documents, which were signed by him in January and July, 1866, knew that there were trusts in the will for the division of the property. If he had intended to represent to the solicitor what his title really was, he must have taken the will to him, and informed him of his position. It is said that he was acting as agent for the trustees. But there is no trace in the evidence of any such representation having been made by him; in fact, all the evidence negatives any such notion. It is hardly to be believed that if he was acting or intended to act in that way, he would have taken only those muniments of title to the solicitor. Indeed, I think it was conceded by the Appellant's counsel that, so far as Mr. *Lyon* knew, he was *Thomas Frederick Cooper*, the elder, the person in whom the title was shewn. Although we have not any clear evidence about it, there is the evidence of a clerk who was present when he came, and, although he cannot recollect what took place, I think he would have recollected it if, when the matter was brought into the office, he had written down a statement that *Thomas Frederick Cooper* was acting only as agent for trustees, and was going to borrow money for them, instead of coming in the ordinary way as a man shewing a title in himself and proposing to borrow money for himself. It is true that this clerk did not prepare the mortgage deeds, but they were prepared in

the office, and there would, I should think, be some recollection in this clerk's mind if anything of the kind had taken place. Then coming in this way, and representing the title to be that which was shewn by the deeds which he brought, he subsequently signs, seals, and delivers the mortgage deeds. And, in my opinion, having brought to the solicitor documents which shew a title, not in himself, but in a person of the same name, when, without any further explanation, he executed the mortgage deeds, he must be taken to have done so, not as his own deeds, but as the deeds of the person in whom the title was shewn. If that be so, if in signing the deeds he represented them to be the deeds of his father, he undoubtedly committed a forgery; that is to say, he made and used a false, feigned instrument, and must be taken to have done so for fraudulent purposes. It is said, what object could he have had in doing this, he having previously obtained money from the trust estate with the consent of his mother and sister. But he was largely involved, he had taken shares in his own name in the *Slate Company*, and there is not the slightest evidence on which we can rely that any of his family knew that he was doing this, or that it was done with their consent or for their benefit. The evidence all points the other way. I regret that I have to come to the conclusion, especially after his death, that he did this fraudulently, but I cannot help coming to the conclusion that, having got the £1200, he desired to keep secret the fact that he required a further sum out of the estate for these speculations, and that this was the motive for his doing what probably he thought was not forgery, but what he must have known to be a fraudulent act.

In my opinion, these deeds on which the Appellants rely are forged deeds, and that puts an end to the case, and shews that the judgment of the Court below was right. Any title under the *Middlesex Registry Act* must be out of the question, because, in the view which I take, the mortgage deeds were not in any way the deeds of the heir. They purported to be the deeds of the father, not the deeds of the heir executed by him as such, and therefore no title under the *Registry Act* can arise out of them. Another point taken was that, at any rate as regards the leaseholds, there was a deposit of the title deeds by the executor, and

C. A. 1882 *In re* COOPER. COOPER *v.* VESEY. Cotton, L.J.

it is said, a Court of Equity will not interfere with the possession thus acquired. But here we have the owner of the legal title coming into a Court of Law and Equity, and saying, there is an attempt to deprive me, not only of my property, but of my title deeds. The legal title is shewn to be in the Plaintiffs, and then, not merely as a Court of Equity, but as a Court of Law, we ought to make the order which has been made in the Court below for the delivery up of the title deeds to the legal owners of the property. The case of *McLeod* v. *Drummond* (1) was relied upon by Mr. *Whitehorne* as an authority to the contrary. But there the application was made simply to a Court of Equity, to enable the Plaintiffs to get back from the Defendants bonds of a testator which they had taken innocently from the co-executors of the Plaintiffs and on which they had advanced money, not knowing who were the persons beneficially interested. And Lord *Eldon* said (2), "Has this Court ever said that a deposit, under such circumstances, could be disturbed, at the instance, not of legatees of any kind, but of co-executors, who did not interfere in the affairs of the testator during fourteen years? This appears to me to be a much stronger case than any in which this Court has interposed against the act of an executor; and upon these grounds I do not disturb this deposit; but I do not decide, or give an opinion, how far, if the title to these bonds was nothing more than deposit, anything can be done to improve the title with reference either to these executors, or other persons interested in the estate, who are not before me." That cannot apply to the present case where the owner of the legal title is asking a Court of Law to compel the delivery up of his title deeds. In my opinion, the judgment of Mr. Justice *Kay* was right.

LINDLEY, L.J.:—

I am of the same opinion. The question we have to decide is whether certain mortgagees have a good title to the property comprised in the mortgage deeds as against the present executors and trustees of the will of a person named *Thomas Frederick Cooper*, the mortgagor being an executor and trustee of the same will. There

(1) 14 Ves. 353; 17 Ves. 152. (2) 17 Ves. 171.

is no question that *Thomas Frederick Cooper*, the son, executed the deeds. And the first question is, whose deeds were they, and what was the effect of them? Were they the deeds of the father? Of course they could not be, for the father had been dead eleven years. Then were they in any and what sense the deeds of the son who executed them? I take it that he was estopped from denying that he executed the deeds, and that any one claiming through him who was not aggrieved by his fraud would be equally estopped. To that extent and in that sense they were his deeds. But the Plaintiffs are not estopped from denying that they were his deeds, and it is competent to them to shew that they were not his deeds. And they seek to do so by evidence which, to my mind, is satisfactory and conclusive. When he took the title-deeds to Messrs. *Newman & Lyon*, and borrowed money from clients of theirs, he in substance represented himself as the person in whom a title was shewn by the deeds and documents which he so took. If there had been no leaseholds, I can imagine that the case might have been put in this way. It might have been said that, inasmuch as the son was his father's heir-at-law, he was representing himself as being in that character the absolute owner of the property. This, although it would have been an untrue and a fraudulent representation, would nevertheless have made the mortgage deeds his deeds, and, the father's will not having been registered, possibly a good title might have been obtained by the mortgagees under the *Registry Act*. But in fact he was dealing not only with the freeholds but also with the leaseholds, to which he could make no title at all except through the will which was suppressed. The inference is irresistible that he was passing himself off, not only as the owner of the freeholds, but also as the owner of the leaseholds; and he could only be that if he was personating his father. As it seems to me we are driven back to this, that he did in fact execute the mortgage deeds, or was estopped from denying that he executed them, representing himself to be the beneficial owner of the freeholds and leaseholds, and that he was the *Thomas Frederick Cooper* to whom the property was conveyed by the deeds which he took to Mr. *Lyon* in order to make out his own title. The authorities shew that the mortgage deeds were, in point of law, for-

C. A.
1882
In re
COOPER.
COOPER
v.
VESEY.
Lindley, L.J.

geries, and documents to which any one, except *Thomas Frederick Cooper*, the son, himself, and persons claiming through him, could successfully plead *non est factum*. That these mortgage deeds were forgeries appears to me to follow from the discussion which took place in *The Queen* v. *Ritson* (1), a remarkable case, in which a man, having executed a conveyance in fee simple, afterwards, intending to deceive, executed a lease of the same property for 999 years, and antedated it in order to cheat the purchaser of the fee simple. It was held that the lease was a forgery, although it was executed by the lessor in his own name. These mortgage deeds were not the son's deeds as against anybody, except himself and persons claiming under him.

There is only one other point to which I will allude, and it is this. It is said, and with some truth, that the Plaintiffs were guilty of negligence in not registering the will, and no doubt in one sense it is the non-registration of the will which has led to this unfortunate fraud. But are they in point of law responsible for that? It appears to me that they are not, and this conclusion is amply covered by authority. The fraud and the loss to the mortgagees is not sufficiently the proximate result of the Plaintiffs' negligence to make them in law responsible for it. A crime intervened—the forgery; and, although they were negligent in not registering the will, that negligence was not the proximate cause of the forgery and still less the proximate cause of the fraud which was the result of the forgery. This point has been discussed more than once, and without referring at length to the authorities which dispose of it, I will mention the names of some of them to shew that I am not speaking without consideration. The matter was much considered in the case of *Bank of Ireland* v. *Trustees of Evans' Charities* (2), and also in *Baxendale* v. *Bennett* (3), and in *Johnston's Claim* (4). In all those cases (and I believe there are others), there had been negligence. That negligence had been followed by a crime—forgery or theft, or something of the kind—which had resulted in loss; and yet it was held that the fraud and the consequent loss were not sufficiently the proximate result of the negligence to make the negli-

(1) Law Rep. 1 C. C. 200.
(2) 5 H. L. C. 389.
(3) 3 Q. B. D. 525.
(4) Law Rep. 6 Ch. 212.

gent persons responsible for it. This appears to me to dispose of the present case, and, having regard to what has been already said by the Master of the Rolls and Lord Justice *Cotton*, I am of opinion that the order of Mr. Justice *Kay* is right and must be affirmed.

Whitehorne:—We ought not to have been ordered to pay costs.

[JESSEL, M.R.:—You cannot appeal as to the costs of the Plaintiffs, they are in the discretion of the Court: *Harpham* v. *Shacklock* (1)].

The *cestuis que trust* ought not to have been made parties, as the Plaintiffs sufficiently represent their interests: Order XVI., r. 7; and therefore we can appeal from the order that we are to pay their costs.

Rigby, for the Plaintiffs:—

No objection was taken as to parties, and indeed the Appellants interrogated the co-Defendants and made use of their answers. The Court will not interfere to alter an order in respect to costs when it does not alter it in substance.

JESSEL, M.R.:—

The costs of the Defendants, who are in the same interest as the Plaintiffs, were clearly not in the discretion of the Court if these Defendants were not proper parties to the action, and in that case the order that the Appellants should pay those costs would be subject to appeal. It is clear that under the present practice these Defendants are not proper parties to the action. The claim is made by executors and trustees on behalf of their trust estate against strangers, and the Plaintiffs are by virtue of r. 7, of Order XVI., entitled to represent their *cestuis que trust* in such an action. The Appellants ought not, therefore, to have been ordered to pay the costs of the *cestuis que trust* and the order must be altered in that respect. And to that extent we can give the Plaintiffs no costs of the appeal, as a punishment to them for

(1) 19 Ch. D. 207, 215.

C. A. 1882 *In re* COOPER. COOPER *v.* VESEY.

making the beneficiaries parties. With regard to the general costs of the appeal, I have no hesitation in saying that if I had had to exercise my discretion at the trial, I should not have made the present Appellants pay any costs. There could not be a stronger case for departing from the general rule that the unsuccessful party in a litigation must pay the costs of his opponent. The son was enabled to commit the fraud by reason of the trust and confidence which was reposed in him by his mother and sister. This is not a sufficient reason for depriving them of their legal right to recover the property. But the Appellants are perfectly innocent persons, who employed a solicitor to act for them and who used due diligence. If there ever was a case in which an unsuccessful litigant ought not to pay costs, this is the one. These circumstances ought to influence us in dealing with the costs of the appeal, and therefore, though we dismiss the appeal, we shall give the Respondents no costs of it.

COTTON, L.J.:—

It must be stated in the order that the Court is of opinion that the *cestuis que trust* ought not to have been made parties to the action.

LINDLEY, L.J., concurred.

Solicitors : *Newman, Jeans, & Co.*; *Lewis & Lewis*; *Allen & Edwards*; *M. Webb & Son.*

W. L. C.

In re CLAGETT'S ESTATE. FORDHAM *v.* CLAGETT.

[1880 C. 0509.]

C. A.
1882
KAY, J.
Jan. 30, 31.
C. A.
May 9, 10.

Insolvency—After-acquired Property—Subsequent Insolvencies and Bankruptcy —32 & 33 Vict. c. 83, *s.* 15—*Close of Insolvency.*

In June, 1836, *C.* took the benefit of the *Insolvent Act* (7 Geo. 4, c. 57) and obtained his discharge, having executed a warrant of attorney upon which judgment was entered up. Two creditors' assignees were then appointed, one being *W.*, a creditor. *C.* subsequently became three times insolvent, and in July, 1854, he became bankrupt under the Act of 1849, and obtained his certificate. He died in January, 1880. *C.* had married the only daughter of a man who died possessed of very considerable property a few months after his first insolvency, whereupon he became entitled, in right of his wife, to that money, which came into his possession on her death in 1877. *W.*, the survivor of the two creditors' assignees under the first insolvency, and himself a creditor, now applied for leave to prove his debt in an action to administer *C.'s* estate:—

Held (affirming the decision of *Kay*, J.), that, under the Act to provide for the winding-up of the business of the Insolvency Courts (32 & 33 Vict. c. 83), the close of the insolvency provided for by sect. 15 was intended to be an absolute close, and that if no steps were taken to postpone the closing within twelve months from the commencement of the Act, then at the expiration of twelve months from the commencement of the Act or at the expiration of twenty years from the filing of the petition, it became the duty of the Court to refuse leave to issue execution; and by analogy it was the duty of this Court to refuse leave to prove the debts in insolvency in the administration action.

Per Jessel, M.R.: A "pending matter" in any Court of Justice means one in which some proceeding may still be taken.

IN this case one *Horatio Clagett*, being in custody for debt, on the 25th of June, 1836, took the benefit of the then Act for the relief of insolvent debtors (7 Geo. 4, c. 57), and applied by petition for his discharge. He obtained his discharge, and two gentlemen named *Mortimer* and *Wyllie*, one of whom, Mr. *Wyllie*, being the survivor, was the present applicant, were appointed creditors' assignees, and all the property which at that time belonged to the insolvent was assigned by the provisional assignee to those creditors' assignees. The insolvent also executed the warrant of attorney required by the provisions of that Act, autho-

C. A. 1882 — *In re* CLAGETT'S ESTATE. FORDHAM v. CLAGETT.

rizing judgment to be entered up against him, in the names of the creditors' assignees, for the amount of the debts stated in the schedule. On the 30th of November, 1836, judgment was entered up under that warrant of attorney for £71,841. Afterwards the debts finally proved in the insolvency were £18,915, upon which a dividend of 3*s.* 7½*d.* was paid, and the balance left due was £15,467. Of that amount Mr. *Wyllie* was a creditor for £1136, upon which he received dividends reducing his debt to the sum of £929, which was now due to him. *Clagett* had married the only child of Mr. *Day*, one of the firm of *Day & Martin*, and upon the 26th of October, 1836, a few months after the insolvent had obtained his discharge from custody, Mr. *Day*, the father, died. He died intestate as to the bulk of his personal estate, and his daughter was his sole next of kin.

On the 28th of January, 1845, *Clagett* became again insolvent, and *Paget* was the provisional assignee, but no creditors' assignee was appointed. On the 29th of January, 1849, *Clagett* again became insolvent, *Paget* again being provisional assignee, and no creditors' assignee was appointed. On the 13th of December, 1850, *Clagett* took the benefit of the Acts then in force for the protection of insolvent debtors, and *Paget* again was the assignee in that proceeding. On the 26th of July, 1854, *Clagett*, having in the meantime entered into a trading business, became bankrupt under the Bankrupt Act of 1849. One *Lee* was appointed assignee in that bankruptcy, and *Clagett* obtained his certificate of conformity on the 23rd of November, 1854. There was no settlement of the property which his wife derived as next of kin of her father. She died in *Clagett's* lifetime on the 30th of March, 1877, by which, independently of the insolvencies and bankruptcies, his absolute title to the property which his wife so acquired from her father was complete. *Clagett* himself lived until the 31st of January, 1880. He had been for some short time before his death of unsound mind. He left a will, and this action was brought for administration of his estate against the Defendants, to whom administration *cum testamento annexo* had been granted. A decree for administration was made in May, 1880.

Mr. *Wyllie*, in his character of surviving creditors' assignee in the first insolvency, now came, upon a summons under the admi-

nistration decree, and asked for leave to enforce against the estate the whole amount of the judgment which had been entered up.

The summons came on to be heard before Mr. Justice *Kay* on the 30th of January, 1882.

Romer, Q.C., and *Yate Lee*, for the claimant, in support of the summons:—

We claim a right to prove for our debt against the estate of *Clagett* under the warrant of attorney, which was entered up against him at the time of his first insolvency. The judgment created a statutory charge on the property which is not barred by lapse of time, and may be enforced in an administration action. *Wyllie's* debt amounted to £1136, but as he received the dividend of 3*s.* 7½*d.*, the debt was reduced to £929. The case of *Barton* v. *Tattersall* (1) is distinctly in our favour. There, a person, who had taken the benefit of the *Insolvent Debtors Act*, first in 1814 and a second time in 1820, died in 1826, leaving assets more than sufficient for payment of all the debts which he had contracted subsequently to his second insolvency, and it was held that the assets ought to be applied in payment, first, of the debts under the second insolvency, and then of the debts scheduled under the first insolvency; and it was further held that the right of the creditors to such relief was not affected by the *Statute of Limitations*. *Ward* v. *Painter* (2) was decided upon the same principle, and there a creditor, under an insolvency, who remained unpaid was held to be entitled to claim against the personal representative of the insolvent in respect of subsequently acquired property. The discharge of an insolvent is only a relief from process—not an extinguishment of the debt. In *Ex parte Pain* (3) the debtor had obtained his discharge under the *Insolvent Act* (1 & 2 Vict. c. 110), after giving a warrant of attorney to the provisional assignee, and afterwards became bankrupt and obtained his order of discharge under the bankruptcy; but it was held that his after-acquired property remained liable to the claim of the official assignee for payment of his debts under the insolvency. That is a clear decision that the true intent of the warrant of attorney is to

(1) 1 Russ. & My. 237. (2) 2 Beav. 85. (3) Law Rep. 3 Ch. 639.

C. A. 1882 *In re* CLAGETT'S ESTATE. FORDHAM v. CLAGETT.

render the insolvent at all times liable to fulfil the obligations attaching to his property. *Galsworthy* v. *Durrant* (1) is also an authority in our favour; and *Re Clagett* (2). The 32 & 33 Vict. c. 83, s. 15, subs. 4, enacts that all pending insolvencies shall be closed and the insolvent placed in the same position as if he had been bankrupt. But in the first place this insolvency is not "pending" in the sense in which the word is used; for the insolvent had obtained his discharge, only the judgment remained in the hands of his assignee; and secondly, if the section is applicable the effect is, that the insolvent is to be treated as a bankrupt, in which case all his property is vested in his assignee, and is available for our claim. The closing of the insolvency can only protect the insolvent's future property, not that which has already fallen into possession.

Crossley, Q.C., and *Langworthy*, for one of the next of kin of *Clagett*:—

Our first point is that the judgment is absolutely void, and that the insolvency has been put an end to by the Act of 32 & 33 Vict. c. 83. The difference between bankruptcy and insolvency was extinguished by that Act, which prevents a man being exposed to these old claims after he has been discharged. That Act contains provisions for the winding-up of all business under the Insolvency Acts, and the 7th section of the Act was never intended to apply to any but recent insolvencies.

By the *Bankruptcy Act* of 6 Geo. 4, c. 16, s. 121, it is enacted that a bankrupt shall be discharged from all debts due by him when he became bankrupt, and from all claims and demands thereby made provable under the commission, in case he should obtain his certificate; and in the case of *Davis* v. *Shapley* (3) it was held that the goods as well as the person were protected by this section, and the goods of a certificated bankrupt acquired after the bankruptcy, being seized under a *fi. fa.*, issued upon a judgment in respect of a debt due before the bankruptcy, the *fi. fa.* was set aside by the Court. A similar decision was given in *Barrow* v. *Poile* (4).

(1) 2 D. F. & J. 466.
(2) 25 L. T. (O.S.) 120.
(3) 1 B. & Ad. 54.
(4) Ibid. 629.

Under any circumstances, *Wyllie* could claim only for the amount of debt due to himself, and not the whole amount for which the judgment was entered up.

[They also cited *Ex parte Welchman* (1), *In re Gosman* (2), and *Ebbs* v. *Boulnois* (3).]

Ince, Q.C., and *Smart*, for the legal personal representative of the deceased bankrupt, referred to the 30th of the General Rules made on the 14th of March, 1870, in pursuance of the Act 32 & 33 Vict. c. 83 (4), which provides for an application to postpone the close of an insolvency, and contended that as no such application had been made, the insolvency was finally closed. The case of *Curtis* v. *Sheffield* (5) decided that where a person had twice taken the benefit of the *Insolvent Debtors Act*, a *chose in action* to which he became entitled between his first and second insolvency, passed to the assignees under the second insolvency, and *Ex parte Barrington* (6) was an authority upon that point. *Henry* v. *Smith* (7) was also cited upon the question of interest. In relation to the *Statute of Limitations*, the rights of judgment creditors for arrears of interest as against the real and personal estates of their debtor are equal and co-extensive, and so far as the bar of the statute operates for the protection of the real estate, to the same extent the personal estate is protected.

Waller, Q.C., and *E. Cutler*, for *Paget*, the assignee in the insolvencies.

Romer, in reply, cited *In re Hinds* (8), where it was held that the close of the insolvency did not prevent the distribution of an insolvent's contingent interest in a fund among his creditors.

KAY, J., after stating the facts of the case, continued:—

I must say, in the first place, that the jurisdiction which the Court of Chancery has assumed in these cases of administration

(1) 11 Ch. D. 48.
(2) 17 Ch. D. 771.
(3) Law Rep. 10 Ch. 479.
(4) Robson's Bankruptcy, 2nd Ed. 892.
(5) 8 Sim. 176.
(6) 1 Dea. 3.
(7) 2 D. & War. 381.
(8) 7 Ch. D. 26.

C. A.
1882
In re CLAGETT'S ESTATE.
FORDHAM *v.* CLAGETT.
Kay, J.

of the assets of a deceased person, seems, so far as is shewn by the authorities cited to me, and the authorities I have been able to discover, to have been confined to the case of creditors being allowed to come in and prove their debts. I do not think any case was cited to me in which the assignee has been allowed to prove *en bloc* the amount of the judgment, and, looking to the authority given by the statute, by analogy to which the Court acts, I confess that it seems to me that it would be a very inconvenient course to allow the assignee to prove for that debt *en bloc*. I need not refer to the provisions of the Act at length, but the nature of the authority given by the statute of the 7 Geo. 4 is this. The assignment which is to be made to the creditors' assignees will pass only property of which the insolvent was possessed at the time when he obtained his discharge. In order to effectuate the rights of the creditors in the insolvency, against any property he may acquire after that time, he is required to give a warrant of attorney under which a judgment may be entered up; and the provisions of the Act are that such judgment need not be revived from to time by a *sci. fa.*, as was then necessary in the case of ordinary judgments, and that it should not be barred by any lapse of time. But then, in order to prevent any undue application or use of that judgment, it cannot be used or made available without the leave of the Court, which then meant the Court in insolvency, and, in order to make it available and to issue execution under it, it was necessary to apply for the leave of the Court in insolvency.

Now, one cannot help a little regretting, in an application of this kind, that that rule was not strictly observed, because I think that there is a great deal of justice in what was said by Lord Justice *Selwyn* in the case of *Ex parte Pain* (1): "The official assignee must come to the Court for an order to compel the insolvent to transfer his stock, and the Court will take all the circumstances into consideration before making the order." However, it seems quite plain that as long ago as the year 1830, in the case of *Barton* v. *Tattersall* (2), a creditor in an insolvency under which judgment had been entered up, as in this case, was allowed to apply, without obtaining execution under the judgment, in the

(1) Law Rep. 3 Ch. 641. (2) 1 Russ. & My. 237, 242.

administration of the assets of the deceased insolvent in Chancery, and to prove his debt; and the Master of the Rolls, Sir *John Leach*, gave the reason thus: "By the several Acts for the relief of insolvent debtors, if the assets of the insolvent are at the time of his death more than sufficient to pay his subsequently contracted debts, they shall go in discharge of the debts from which he was relieved by the insolvent Acts; and a particular mode is prescribed in which the benefit of that provision is to be obtained. That mode has not been followed in the present case; and the question is whether a Court of Equity has authority to administer the assets in discharge of those debts. I am of opinion that it has such authority." Treating the administration of the assets in Chancery as being a thing which was entirely within the control and management of the Court of Chancery, and looking upon the creditors' right as preserved by the judgment, the Master of the Rolls seems to have thought that, without going through the formal process of obtaining leave to issue execution under that judgment in a case where it seemed to him there was no reason why such leave should not be given if it had been applied for, the Court of Chancery had sufficient jurisdiction over the fund which it was then administering to admit the creditors' claim. That seems to have been followed, though with some reluctance, in subsequent cases, and of course it is binding upon me. Therefore, looking to Mr. *Wyllie's* application, at any rate to the extent of his own debt, it seems to me that the Court has jurisdiction if it should think, having regard to all the circumstances of the case, as Lord Justice *Selwyn* said, that it is a proper thing to allow him now to come in and prove his own debt; but I should certainly hesitate very long before I allowed him to prove the whole mass of the debts that were proved in the insolvency; because the effect of that would be practically to tie up the administration of this estate for a very long time, and to oblige the administrator, or the Court administering the estate, to keep in hand a very large amount of the assets in order to see whether or not the creditors under the insolvency could be found out, and the money distributed among them. That would be a most inconvenient course, and I do not find that warranted by any authority which has been cited to me. But at any rate, Mr. *Wyllie* has a *locus*

C. A. 1882 — *In re* CLAGETT'S ESTATE. FORDHAM *v.* CLAGETT. — Kay, J.

standi to the extent of his own debt, which is, as I have already said, considerable, being something over £900.

Now then comes the question, ought the Court to allow Mr. *Wyllie* to prove, or to be admitted as a creditor for his own debt? Of course, if it ought, it should also allow any other creditor under that first insolvency to be also admitted to prove for his debt.

First of all, it certainly strikes one as extraordinary that after three subsequent insolvencies and a bankruptcy, it should be thought a right thing to allow this judgment to be enforced against the assets, because these insolvencies and this bankruptcy—every one of them—were after the time when the right of *Clagett* to this property, which, as I understand, is the bulk of his property, and which he derived from Mr. *Day*, through his wife, became a vested interest, and it must have passed to the assignee in the first insolvency, or if not to the assignee in the second insolvency, or if not to the assignee in the third insolvency, or if not to the trustee in bankruptcy; and in the case, which I cannot find has ever been overruled, of *Curtis* v. *Sheffield* (1), I find it was decided that where a person had twice taken the benefit of the *Insolvent Debtors Act*, a *chose in action* to which he became entitled between the first and second insolvency passed to the assignee under the second insolvency, and the judgment creditor under the warrant of attorney in the first insolvency had only a subsequent right to it. There seems to me, if I may venture to say so, to be very good sense in that, because the assignee in the second insolvency gets the property actually vested in him, whereas the creditors under the first insolvency have nothing but a right to apply to the Insolvent Court to enforce their judgment; and if they have been so supine or so unfortunate as not to have obtained that leave until the property is actually vested in the assignee under a subsequent insolvency or bankruptcy, it would seem very strange that, notwithstanding, the Court of Insolvency should give them the prior right to the assets. Indeed several cases have been cited to me which seem to establish that the creditor in an insolvency who has not been paid has actually a right to prove in the subsequent bankruptcy. Therefore it should

(1) 8 Sim. 176.

seem to follow that when in that bankruptcy the bankrupt obtains his discharge, seeing that the discharge is generally a discharge of the bankrupt from all proveable debts, it should also discharge the debts in the insolvency which were proveable in the bankruptcy. That point seems distinctly to have been brought to the attention of the Court of Appeal, consisting of two very learned Judges, Lord *Hatherley* and Lord Justice *Selwyn*, in the case of *Ex parte Pain* (1). In that case there had been a subsequent bankruptcy, and though it was only argued by the bankrupt in person, still it was argued upon the footing of a previous decision; and it was attempted to distinguish the case from a previous decision of *Re Clagett* (2), which has been cited to me, upon the ground that the debts being proveable in the bankruptcy, in which a discharge had been obtained, that discharge must be a discharge of those debts in the insolvency which might have been proved in the bankruptcy. However, it was decided by those two learned Judges that such discharge did not interfere with the power of the Court to give leave to issue execution against the future property under the judgment entered up in the insolvency, and that a right did remain notwithstanding the bankruptcy for the benefit of the creditors in the previous insolvency. Of course that decision would be binding upon me, and I should be bound to follow it in a like case.

But there remains a question which strikes me as the material question, and one which, so far as I know, is entirely novel; namely, what is the effect in this case of the Act of 32 & 33 Vict. c. 83, which was an Act to provide for the winding-up of the business of late Acts for the relief of insolvent debtors in *England*, and to repeal enactments relating to insolvencies, bankruptcies, and imprisonments for debts and matters connected therewith. The history of the legislation, so far as it is necessary to refer to it now, is this; by the *Bankruptcy Act* of 1861 persons who were non-traders were enabled to become bankrupt, and certain provisions in the Insolvency Acts were then repealed, but the whole of the Insolvency Acts were not repealed, so, that as I understand it, after 1861 no fresh insolvency as distinguished from bankruptcy could be effected; everybody, whether trader or non-trader, might

(1) Law Rep. 3 Ch. 639. (2) 25 L. T. (O. S.) 120.

C. A.
1882
In re CLAGETT'S ESTATE.
FORDHAM *v.* CLAGETT.
Kay, J.

be made bankrupt and not insolvent, but the provisions of the *Insolvency Act* with respect to pending insolvencies were not interfered with or taken away. But by this Act which I am referring to, the *Insolvent Debtors Acts* are repealed, with a saving in the 20th clause that the repeal was not to affect the past operation of any such enactment, or any right, title, obligation, or liability accrued, or restriction imposed before the commencement of this Act; nor was it to interfere with the prosecution or to affect the course of any legal proceeding pending in bankruptcy or otherwise under any such enactment before the commencement of this Act, but, subject to the provisions of the *Bankruptcy Act* of 1869 and the *Debtors Act* of 1869, such proceedings shall be prosecuted as if this Act had not been passed.

By this Act it is provided, by the 15th section: "For the purpose of winding up and terminating all matters which at the commencement of this Act may be pending in the late Insolvent Debtors' Court, and in County Courts under the Act for the relief of insolvent debtors, the following provisions shall have effect. Every insolvency shall, at the expiration of twelve months from the commencement of this Act, or at the expiration of twenty years from the date of the filing of the petition, whichever last happens, be closed." Before that time there is a provision in the next sub-section that any assignee, creditor or person interested in an insolvency, may apply to have the close postponed, and there is power, on sufficient cause being shewn, to postpone the close. The 4th sub-section is this: "If sufficient cause for postponement is not shewn before the expiration of the said twelve months, or twenty years, or the period of postponement, as the case may be, or of such further period as may, subject to the rules of Court, be allowed for an application by the Court in which the case is pending, the insolvency shall, at the expiration of the said times be *ipso facto* closed, and thereupon the insolvent, or the heirs, devisees, or personal representatives of the insolvent if he is dead, shall be in the same position, and have the same rights in all respects as if the insolvent had been bankrupt, and had at the date of the closing obtained his discharge under the *Bankruptcy Act*, 1869." Now there is, what is not unusual in an Act, a puzzle for the judge to solve as to what was in the mind of

the draughtsman; of course I have no means of knowing, except from the words used. There are two or three possible meanings to put upon it. One is this: if the insolvency is more than twenty years old, a year's grace is given after the passing of this Act. Within that time the assignee, or any creditor, or anybody interested, may either apply to postpone the closing, or may take such proceedings as he may be able to take, or may be advised to take to enforce the judgment which has been entered up against any property acquired in the meantime, or if he does not, if he applies afterwards, he will be too late. That is one possible construction. Another possible construction is this, that it only means that no property acquired after the closing shall in any way be made liable to the creditors in the insolvency, but that application may be made at any time after the closing to execute the judgment, or to come in as a creditor in an administration action like this, and the Court will be bound to say, "Very well, you may come in, but the only property you can affect by your judgment, or by your proof, will be such property as the insolvent had at the time of the close of the insolvency under this Act." That is another possible construction. The third possible view is this. The words are these: "the insolvent or his heirs, devisees, or personal representatives if he is dead, shall be in the same position and have the same rights in all respects as if the insolvent had been bankrupt, and had, at the date of the closing, obtained his discharge." Suppose there had been a bankruptcy, and that he had obtained his discharge one year after the passing of this Act. Then looking back to the 15th section of the *Bankruptcy Act*, it seems that all such property as belonged to or was vested in the bankrupt at the commencement of the bankruptcy, or might be acquired by or devolve upon him during its continuance, would be liable to be divided among his creditors, and that would give to the assignee in insolvency a right infinitely larger than he had under the *Insolvency Act*, and by way of closing the insolvency he would acquire under this 4th sub-section of the 15th clause of this Act a right to have vested in the assignee in insolvency, or otherwise applied for the benefit of the creditors of the insolvent, all the property which the insolvent acquired after the date of the assignment in the insolvency, and down to this time, namely,

C. A. 1882 *In re* CLAGETT'S ESTATE. FORDHAM *v.* CLAGETT. Kay, J.

in this case a year after the passing of this Act. That is also a possible construction of the words, and according to their literal reading it seems to be *primâ facie* the meaning. But it is impossible to put that meaning on them, because that would be giving, under a section which is intended to close the insolvency, to the assignee in insolvency and the creditors, rights infinitely larger than they could ever obtain in the insolvency itself; because in the insolvency their utmost right is to obtain leave to issue execution on the judgment, which is a matter of discretion in the Court. Looking to all the circumstances, and considering that if this construction were put upon the Act, it would absolutely vest, or if not vest absolutely, make the property which the insolvent acquired down to the time here fixed for closing the insolvency, divisible among his creditors in the insolvency, I cannot for a moment suppose that was the meaning of the Legislature, and without very clear words I could not attribute that meaning to it.

Between the other two interpretations, which is the true one? Is it the true meaning that at any time after the closing it is competent for the assignee or a creditor in the insolvency to apply to issue execution under the judgment against all property acquired by the insolvent down to the closing of the insolvency? In my opinion that is not the meaning. It seems to me the meaning is this, that the close is to be an absolute close. A year of grace is given in which any creditors, or the assignee, or any other person interested in the insolvency, may apply to postpone the closing; or if he like he may apply for leave to issue execution, or he may take any other step which the law enables him to take during that year which I have called the year of grace, and if he does not, it seems to me that the intention of this Act is that after that year of grace his right should come to an end, and that it would be the duty of any Court, to which application was made after the expiration of that year for leave to issue execution, to refuse that leave; and by analogy it seems to me to be the duty of the Court of Chancery if, as in this case, application is made for leave to prove the debts in the insolvency in the administration action, to refuse that leave also; and I accordingly dismiss this application with costs.

Romer, Q.C., submitted that his clients being unsatisfied creditors ought not to pay the costs of all the different parties appearing. C. A. 1882 *In re* CLAGETT'S ESTATE. FORDHAM *v.* CLAGETT.

KAY, J :—

In my opinion it is an experiment which has failed, and it must fail with the usual result. You must pay the costs of all you have served, and also the costs of the action, which were left for me to decide.

T. W. G.

From this decision the claimant appealed. The appeal came on to be heard on the 9th of May, 1882. C. A.

Romer, Q.C., and *Yate Lee*, for the Appellant, relied on the same construction of the 32 & 33 Vict. c. 83, s. 15 (sub-s. 4), as in the Court below.

Waller, Q.C., and *E. Cutler*, for the assignee in the other insolvencies.

Ince, Q.C., and *Smart*, for the administrator of *Clagett*.

Crossley, Q.C., and *Langworthy*, for one of his next of kin.

The counsel for the Respondents were not called on.

JESSEL, M.R. :—

In my opinion the decision of Mr. Justice *Kay* with regard to the construction of the 15th section of the *Insolvent Court Repeal Act* of 1869 is right. I do not feel embarrassed by some of the considerations which were present to his mind, but I may say that I entirely concur in the conclusions at which he arrived.

The point is by no means free from difficulty if you look at the mere wording of the Act, because there is no doubt that the wording is not as clear as it might be, and the only observation that one ought to make upon that is that if it was clear there would be no argument and no discussion upon it. In the multitude of Acts, and considering the enormous length of modern Acts in particular, it is quite impossible to suppose that there are

C. A. 1882 *In re* CLAGETT'S ESTATE. FORDHAM *v.* CLAGETT. Jessel, M.R.

not some sections which will be open to more than one interpretation, and it is so in the case we have now before us. But we must consider the position of the matter as regards insolvents at the time this Act passed. It was this; the insolvent's property acquired before his discharge vested in the provisional assignee, using the word "property" in its just sense, including contingent and reversionary interests. After his discharge the insolvent was to be allowed to keep his after-acquired property in his own hands, subject to this—that the creditor's assignee could enter up judgment for the amount of the debts, and he was at liberty to enforce that judgment by an application to the Insolvent Court against the after-acquired property of the insolvent to such an extent as the Insolvent Court should think fit. According to the practice of the Insolvent Court, that Court would never allow a judgment to be enforced against the discharged insolvent to the extent of depriving him of his whole after-acquired property. Nay more, they always left him enough to carry on his business if he was carrying on business, or if not, at all events enough wherewith to maintain himself. They administered the discretion reposed in them in this spirit, that the insolvent was to be encouraged to earn a livelihood after his discharge so as to be able to maintain himself in a reasonable way, and not to be deprived of the means of carrying on his business, and that the past creditors were only to have the surplus over and above what was so required applied in discharge wholly or partially of their debts. Now that was the position of matters when the Act passed. The Act was intended to abolish, and did in fact abolish this system, and, indeed, was intended to do more than that, for it was intended to assimilate the position of insolvents to the position of bankrupts. In former days traders only could be made bankrupt. Afterwards non-traders could be made bankrupt, and the insolvent law applied, roughly speaking, to non-traders, and the bankrupt law applied to traders. Where there was one law applied both to non-traders and to traders the Legislature had to consider what should be done in respect of after-acquired property, and of course it was decided that there was no longer to be a distinction between non-traders and traders. They were all bankrupts alike, and they were all discharged alike, but, subject to some exceptions which I need

not mention, the discharged bankrupt was free from liability with respect to his after-acquired property.

Then the Legislature had to consider what was to be done in the case of past insolvents, and of course it was obvious that past insolvents ought to be placed upon the same footing as future insolvents, subject to this, that you were not unduly to interfere with the rights of creditors under old insolvencies.

Then what was the course that the Legislature has always taken in similar cases? Take the case of a new *Statute of Limitations* abridging the time within which a creditor or claimant could bring an action. In those cases it has always been the practice to put existing creditors and claimants upon the same footing as future creditors and claimants, with this exception, that a limited time is given to the existing creditors and claimants from the time of the passing of the Act to enforce their rights although the time fixed by the new Act shall have expired; that is to say, they cut down their existing rights to a limited period, but they do not deprive them of them altogether. According to that analogy the Legislature would have said to a creditor under an old insolvency, "You shall have a limited time in which to enforce your judgment against the after-acquired property, and after that your rights shall cease." But there is another case to be considered. The after-acquired property might be in such a position that the creditor could not enforce his rights against it. It might be a reversionary interest, either vested or contingent. Then, according to the practice of the Insolvent Court, they did not sell that, or allow the judgment creditor to take that, but they waited until it fell in. Consequently, at the time of the passing of the Act as to future-acquired property, they said that as to property which the Insolvent Court would not take some other provisions should be made, and consequently it was suggested—and you will see that it was carried out—that in those cases the closing of the insolvency should be postponed; that is to say, the creditor might apply to the Court within the year to postpone the closing of the insolvency, and shew reasons for that being done. For instance, he might say, "There is property of the insolvent which may come in as to which I shall be entitled to a share or to the whole of it, and I shall lose that property unless you extend the

C. A. 1882 *In re* CLAGETT'S ESTATE. FORDHAM *v.* CLAGETT. Jessel, M.R.

time for closing the insolvency so as to enable me to get it." It appears to me that is all fairly provided for, although I agree in language which is open to more than one interpretation.

What was pressed upon us as the interpretation of this language was this. It was said that according to the literal wording—and I am not saying that it is not a possible interpretation of the words—when the insolvency was closed under this Act, the insolvent was to be in the same position at that moment as a bankrupt discharged. Now a bankrupt discharged at that moment would be in this position by virtue of other provisions in the *Bankruptcy Act;* namely, that all the property which the bankrupt had acquired previously to his discharge, whether vested or contingent, would vest in the trustee under the bankruptcy, and the result, therefore, would be that if this so-called legal meaning applies to the case of an insolvent who had been insolvent thirty years before, and had acquired a large property subsequently, he would lose it upon the passing of the Act if there was not more than sufficient to pay his old debts in full. Under the old Act he was entitled to maintenance, and was also entitled to sufficient to carry on his business; whereas now, if that contention is correct, he would be deprived of everything without leaving him a single fraction. It would amount to a complete forfeiture of all the property which the insolvent had acquired subsequently, property of which he could not be deprived under the then law, having regard to the established practice under the Insolvency Acts. Is that not an absurd and monstrous proposition to bring forward? Is it not absurd to place such an interpretation upon the Act passed for the relief of insolvents? Is it not a monstrous injustice to seek to deprive them of their property without giving them any compensation whatever? I know of no term more apt to describe such an interpretation of the Act, and certainly if it could be avoided in no other way, I should think that it would be avoided on the ground that no Court is bound to put a meaning upon the terms of an Act of Parliament which is opposed to the obvious intentions of the Legislature, as it may be gathered from the other sections of the Act.

Having said what I think necessary upon that, I will go to the words of the section. First of all, as I have said before, the

Insolvent Court is abolished, and by the 4th section in certain cases the Court of Bankruptcy has jurisdiction given to it. Then the 15th section says: "For the purpose of winding up and terminating all matters, which at the commencement of this Act may be pending in the late Insolvent Debtors Court, &c., the following provisions shall have effect." What is the meaning of the word "pending"? In my opinion, it includes every insolvency in which any proceeding can by any possibility be taken. That I think is the meaning of the word "pending." Where the insolvent is dead and all the estate is gone it is not pending, but as long as he is alive the matter is pending in that sense. A cause is said to be pending in a Court of justice when any proceeding can be taken in it. That is the test. If you can take any proceeding it is pending. "Pending" does not mean that it has not been tried. It may have been tried years ago. In fact, in the days of the old Court of Chancery, we were familiar with cases which had been tried fifty or even one hundred years before, and which were still pending. Sometimes, no doubt, they require a process which we call reviving, but which the Scotch call waking up; but nevertheless they were pending suits, and all such causes have been transferred to the High Court of Justice under the words "causes which shall be pending" in the 22nd section of the *Judicature Act*, 1873, when the word "pending" is used in this large sense.

Then what do you want to wind up as regards the insolvency which remains in this sense only—that the insolvent is alive and has acquired property? All that is left of the insolvency is to dispose of an application for applying a portion of that insolvent's property in payment of his debts, and then you are to wind up and terminate the whole thing. That is the object of the statute. Is it to be said that when you talk of winding up and terminating you do not mean winding up and terminating everything "pending"? Clearly you do, and consequently we have to look at the words only of the first part of the section. The object is to get rid of the business. The 1st sub-section says, "Every insolvency shall at the expiration of twelve months from the commencement of this Act, or at the expiration of twenty years from the date of the filing of the petition (whichever last happens), be closed." What

C. A. 1882 *In re* CLAGETT'S ESTATE. FORDHAM *v.* CLAGETT. Jessel, M.R.

does that mean? What is the meaning of closing an insolvency twenty years after the filing of the petition? The insolvent has been discharged. No one is ever kept in prison for twenty years under an insolvency. He could not remain if he wished it, and therefore it cannot refer to the discharge of the insolvent, when it speaks of closing an insolvency at the end of twenty years from the date of the filing of the petition. It must mean "closing" to apply to cases where the men have been discharged many years before, and where you have really nothing else to close but these subsequent proceedings. It can only apply to after-acquired property. What is it to be closed for? Certainly to put an end to it. It is done for the purpose of terminating the whole thing. But now look at the next sub-section: "Before the expiration of the said twelve months, or twenty years, as the case may be, any assignee, creditor, or other person interested in an insolvency, may apply in the prescribed manner to the Court in which it is pending, to have the close of such insolvency postponed, and the Judge of such Court, on sufficient cause being shewn for the postponement, may (subject to the rules of Court) postpone such close for such period and on such terms and conditions (if any) as he thinks just." That as I said before applies to cases where there is a large property which is contingent or reversionary, and there the creditors may come in, or the assignees may say, "We cannot get an order, but he has acquired a right to property which at some time he will come into possession of, and which is of great value; therefore keep the insolvency open so that we may reach it." Now we come to something else in the 3rd sub-section: "If the close is postponed, the same proceedings may be had before the expiration of the period of postponement as is provided by this section before the expiration of the said twenty years." That is, instead of twelve months you get the larger period. Then if it is closed, this is what the Act in sub-sect. 4 says: "If sufficient cause for postponement is not shewn before the expiration of the said twelve months, or twenty years, or the period of postponement (as the case may be) or of such further period as may, subject to the rules of Court, be allowed for an application by the Court in which the case is pending, the insolvency shall, at the expiration of the said times, be *ipso facto* closed." I should have said that

that would put an end to all possibility of proceedings whatever, but it goes on, "and thereupon the insolvent, or the heirs, devisees, or personal representatives of the insolvent (if he is dead) shall be in the same position and have the same rights in all respects as if the insolvent had been bankrupt, and had at the date of the closing obtained his discharge under the *Bankruptcy Act*, 1869." As I said before, it has been argued that those words "shall be in the same position and have the same rights in all respects as if the insolvent had been bankrupt" would vest his property up to the date of the bankruptcy in the assignee or trustee in the bankruptcy. I have dealt with that. If that is not the meaning, what is the meaning? It says, "shall have the same rights;" that is to say, shall be in the same position as to his rights. He shall be as free from future claims under the Insolvency Acts as he would have been if he had been a bankrupt, and had obtained his discharge under the *Bankruptcy Act*. That is the meaning which has been given to it by Mr. Justice *Kay*, and I think that is the fair meaning of the words, and when it is possible to give more than one meaning to particular words we must look to see what was the object of the Legislature. The argument addressed to us appears to me to attribute a cruel and perverse intention to the Legislature, which certainly ought not to be attributed to the Legislature under any circumstances. In my opinion the appeal should be dismissed with costs.

LINDLEY, L.J.:—

I take the same view of the construction of this Act as was taken by Mr. Justice *Kay*, and has now been expressed by the Master of the Rolls. In the first place, we must bear in mind that this Act of 1869 (the 32 & 33 Vict. c. 83) was one of several Acts of Parliament, all of which had for their object the abolition of the distinction between insolvency and bankruptcy and of the imprisonment of debtors simply for non-payment of their debts; and of course it became necessary in order to complete that scheme to provide for what should be done in pending insolvencies, that is to say, insolvencies in which any steps could be taken under the Insolvent Debtors Acts which were then in force. Those Acts were themselves repealed. I need not refer to the

C. A. 1882 *In re* CLAGETT'S ESTATE. FORDHAM *v.* CLAGETT. Lindley, L.J.

repealing section, but bearing that in mind, we come first of all to sect. 4 of this Act, which substitutes the Court of Bankruptcy for the old Insolvent Court. That is the short effect of it. Then comes sect. 7, which is not applicable to this case, but which is applicable to the case of a person who had been insolvent and who is adjudicated a bankrupt. Then we come to sects. 14 and 15, which provide for the winding-up and termination of proceedings under the old Insolvency Acts. It was the object to bring all insolvencies to a close, and bearing in mind that some insolvencies were open, although very old, and some were comparatively recent, the Act deals with both classes of insolvencies, and it says that, "For the purpose of winding up all matters which at the commencement of the Act may be pending in the late Insolvent Debtors Court, &c. Every insolvency shall at the expiration of twelve months from the commencement of this Act, or at the expiration of twenty years from the date of the filing of the petition (whichever last happens), be closed." What does that mean? It means that here is a new period for winding up, and finally closing everything under all anterior insolvencies. They may be twenty years old. If they are twenty years old or more, the Legislature say, "We will give all the creditors still a year to come in and make what they can of such rights as they have. But if the insolvencies are recent, then they shall have twenty years from the time of the filing of the petition; but they must take any step which they think proper to take within that statutory limit." That appears to me to be the primary object of the whole clause.

Then it goes on to provide for applications for enlargement of time. That is the 2nd sub-section. The 3rd is merely consequential. Then the 4th sub-section says what is to be done at the end of the statutory periods of one year or of twenty years. If we look at the language of clause 15, the 2nd sub-section is the only section in which creditors are mentioned. It says what they may do. It says that they may apply to the Court to keep the matter open, and it may be kept open for such period and on such terms and conditions as the Judge thinks fit. The 4th sub-section is addressed to the effect upon the insolvent himself, which is dealing with the matter from a different point of view.

It does appear to me to be a strong thing to say, that, in a section intended to put an end to these insolvency proceedings and to put an end to the time within which these claims should be made, an insolvent against whom no proceedings were taken within the twelve months should be worse off than the man in whose case proceedings were taken, which would be the technical construction put upon it by Mr. *Romer*. The fourth clause, dealing with the insolvent and not being addressed to creditors, or anything of the kind, says this: "If sufficient cause for postponement is not shewn before the expiration of the said twelve months or twenty years, or the period of postponement (as the case may be) or of such further period as may, subject to the Rules of Court, be allowed for an application by the Court in which the case is pending, the insolvency shall, at the expiration of the said times, be *ipso facto* closed." That is to say, there is to be an end of all proceedings under the insolvency. That is what that means, and then it goes on to make the thing plainer, for it says, "And thereupon the insolvent," it is not talking of his creditors or anything of the kind, "or the heirs, devisees, or personal representatives of the insolvent (if he is dead) shall be in the same position and have the same rights in all respects as if the insolvent had been bankrupt, and had at the date of the closing obtained his discharge under the *Bankruptcy Act*, 1869." That appears to me to amount to this; that after the statutory period of twelve months or twenty years, or such further period as may be fixed in the interest of the creditors who may apply within the proper time, that after that time no proceedings are to be taken at all against the insolvent under the insolvency for any cause or matter. That appears to me to be the primary object. I am quite aware that there may be another construction, which indeed has been put forward by Mr. *Romer;* but the answer to it is that it leads to a conclusion which no Court ought to be driven to, of reading the words in such a way as to give them a meaning which is obviously contrary to the whole object of the clause which we have to consider, and it appears to me to be entirely irrational to say that an insolvent under this clause was intended to be in a worse position after the close of the bankruptcy than he could by possibility have been before if the creditors had applied

C. A. 1882 *In re* CLAGETT'S ESTATE. FORDHAM *v.* CLAGETT.

within the time limited, namely, the one year or twenty years, as the case may be, to enforce their judgment, so as to affect his after-acquired property. And when it is remembered that this is an application to take advantage of a debt forty-six years old, we need not be much alarmed at the consequences of our decision.

HOLKER, J.:—

I am entirely of the same opinion.

Solicitors: *Horne, Hunter & Birkett; Turner & Low; Parkers.*

M. W.

WILLIAMS *v.* WILLIAMS.

KAY, J.

1882

March 8.

[1881 W. 247.]

Dead Body — Property — Possession — Direction by Will — Cremation — Claim founded on Fraud.

A testator directed *W.* to burn his body, and directed his executors to repay *W.* the expense of so doing. The body was buried in unconsecrated ground with the assent of the executors. Afterwards *W.* representing to the Under-Secretary of State that she intended to bury it in consecrated ground, obtained his license to remove it. She caused it to be burnt in *Italy*, and then brought an action against the executors for the expenses. The action was dismissed:—

Held, that there is no property in a dead body, but the executors have a right to the possession of the body, and their duty is to bury it.

Held, that a direction by will as to the disposition of the testator's body cannot be enforced.

Whether it is lawful to burn a dead body, *quære*.

HENRY CROOKENDEN, by a fourth codicil to his will, directed that within three days after his death, or as soon as conveniently might be, his body should be given to his friend *Eliza Williams* to be dealt with by her in such manner as he had directed to be done in a private letter to her; he then gave her certain prints and an earthenware vase by *Wedgwood* for the purpose to which he had directed her to apply the same in the private letter to her; and he directed that any costs or expenses that might be incurred by her in carrying out and performing the instructions contained in the private letter should be paid and discharged by his executors on production of accounts and vouchers within three months after his decease. The testator had written to Miss *Williams* a letter dated the 28th of March, 1875, in which he referred to the directions in the codicil, and said that he should like to be burnt when dead on or rather under a pile of wood; he should like the calcined bones and fragments to be put in the *Wedgwood* vase named in the codicil, or if that was not large enough, in any other; the ultimate disposal of the vase and its contents he left entirely to her. He also sent the codicil to Miss *Williams*, and desired her to keep and use it when the occasion

KAY, J.
1882
WILLIAMS
v.
WILLIAMS.

required. Miss *Williams* stated, and the Defendants admitted, that the testator was an advocate for cremation, and that she had promised him to carry into effect his wishes as to having his body burnt.

He died on the 21st of December, 1875, and was buried three days afterwards in the unconsecrated part of the *Brompton Cemetery* with the rites of the Roman Catholic Church, by the direction of his widow and one of his sons, the other being in *India*. The executors paid the expenses of the funeral and appeared to have sanctioned what had been done as to the funeral. At or before the funeral Miss *Williams* made some protest or claim as to the disposal of the body, but she had not then at hand the codicil and letter, and there was a dispute as to exactly what took place.

On the 3rd of March, 1876, Miss *Williams*, without communication to the executors or the widow or sons, wrote to the Home Secretary enclosing copies of the codicil and letter, and praying "that you will grant me a license to remove the body for the purpose of carrying out the wishes of the testator, either by having it burnt in this country or elsewhere; or if there is any legal impediment or objection to that, for the purpose of having it placed in consecrated ground."

The Under-Secretary of State sent an answer refusing to permit the removal of the body for the purpose of having it destroyed by cremation after burial; and asking to what burial-ground it was proposed to remove the body. To this Miss *Williams* replied:—

"*Henllys, Berrien, Montgomeryshire.*

"Sir,—Your letter of the 20th of March, 1876, only reached me to-day. In answer to your question as to what burial-ground it is proposed to remove the remains. It is to the churchyard of this parish, *Manafan, Montgomeryshire,* that they would be removed."

Thereupon the Home Secretary on the 23rd of March, 1876, granted her a license "for the removal of the body of *Henry Crookenden*, deceased, from the grave in which it is interred in the unconsecrated portion of the *Brompton Cemetery*." On the 11th of November, 1876, Miss *Williams* wrote to the executors that if the time should ever arrive when she found it possible to carry

out the wishes of Mr. *Crookenden* she should do so. The managers of the *Brompton Cemetery* in December, 1877, informed the solicitors of the widow and sons that the license had been granted, and they thereupon wrote to Miss *Williams* and to the Secretary of State, and on the 20th of March, 1878, the license was revoked. But on the 14th of March Miss *Williams* had caused the body to be disinterred, and in April, 1878, Mrs. *Crookenden* learnt from an Italian newspaper that it had been taken to *Milan* and there burnt. Miss *Williams* had since caused the ashes to be placed in the *Wedgwood* vase and to be buried in consecrated ground.

Miss *Williams* brought this action against the executors, *T. J. Williams* and *C. J. Davenport*, and Mrs. *Crookenden* and the two sons of Mr. *Crookenden* (the residue having been distributed to them) claiming to be paid £321 as the expense incurred in carrying out the intentions of the testator.

Higgins, Q.C., and *Laing*, for the Plaintiff:—

The direction in the codicil is not exactly a legacy, but it has always been considered that a man can dispose of his own body. If he directs his executors to bury him in a particular place or way they must do so. Even if there is no property in a body, as seems to have been held in *Reg.* v. *Sharpe* (1), a direction as to disposal may be good. A testator may in many ways leave property to objects in which he has no interest, and here he has directed his executors to pay these expenses. It is not the custom to burn bodies in this country, but there is no law against doing so, nor is it *contra bonos mores*, so that there is no reason on that ground why she should not be repaid.

[KAY, J.:—*Reg.* v. *Stewart* (2) shews that the body is to be buried.]

The manner in which Miss *Williams* got possession of the body is not in question here. She had possession, and did what the testator directed her to do, and she has a right to the expense of so doing. The widow and sons buried the body before the time when it was to be given to Miss *Williams*.

(1) Dea. & Bell, C. C. 160.

(2) 12 Ad. & E. 773.

KAY, J.
1882
WILLIAMS v. WILLIAMS.

Owen, for one executor.

Rigby, Q.C., and *Popham*, for the other executor, and the widow and sons:—

The executors have a right to the possession of the body: *Reg.* v. *Fox* (1), and can recover it from any one else. They have the sole discretion as to the funeral: *Stag* v. *Punter* (2), and the testator's directions are frequently disregarded: *Dawson* v. *Small* (3); *Lloyd* v. *Lloyd* (4). Where no living person is entitled to the benefit of a trust the executors may perform it, or may disregard it, unless it amounts to a charity. Removal from a grave is a misdemeanor: *Rex* v. *Lynn* (5). A license to remove for one purpose will not justify a removal for another purpose, and leaves the removal an indictable offence. At all events, the testator did not mean his body to be burned after it had been buried.

Higgins, in reply:—

In *Reg.* v. *Fox* the only question was whether a body could be detained for debt. In *Reg.* v. *Sharpe* (6) the Defendant was a trespasser: *Russell* on Crimes (7). The executors have no property in the body, and a man has a right to direct who is to have the custody of his body. The Home Secretary's license cannot affect the question of misdemeanor.

KAY, J.:—

I do not delay giving judgment, as from the time when I learned the facts of the case my opinion upon it has not been altered. [His Lordship then stated the facts of the case down to the funeral.]

Several legal points have been raised, on which I have not felt a moment's doubt, and which I will dispose of in the first instance. It is quite clearly the law of this country that there

(1) 2 Q. B. 246.
(2) 3 Atk. 119.
(3) Law Rep. 18 Eq. 114.
(4) 2 Sim (N.S.) 255.
(5) 2 T. R. 733.
(6) Dea. & Bell, C. C. 160.
(7) Page 611.

can be no property in the dead body of a human being. That was declared to be the law in the case of *Reg.* v. *Sharpe* (1), and as the decision is useful for other reasons, I will refer to the case more at length. It was an indictment for unlawfully digging-up and taking the body of a deceased person out of a grave. It seems that the defendant's family had belonged to a congregation of dissenters, and his mother with some other of his relatives had been buried in one grave in the burying-ground of the congregation; that his father had recently died, and that the defendant prevailed on the person to whom the key of the burying ground was entrusted to allow him to cause the grave to be opened under the pretext that he wished to bury his father in the same grave; that he caused the remains of the coffin of his mother with the corpse to be placed in a shell and carried some miles away towards the churchyard where he intended to bury his father's corpse with the remains of his mother. These acts were done without the knowledge or consent of the congregation to whom the burying-ground belonged, or of the trustees having the legal estate therein. The person having the keys of the ground was induced to admit the defendant into the ground and to the grave by reason of the pretext that he intended to bury his father there. The jury found that this was only a pretext, and that his real intention was from the beginning, to remove his mother's corpse; that he acted throughout without the intention of disrespect to any one, being actuated by motives of affection towards his mother, and of religious duty. Mr. Justice *Erle* delivered the judgment of the Court, which consisted besides of *Pollock*, C.B., *Willes*, J., *Bramwell*, B., and *Watson*, B., in these words—[His Lordship then read the judgment, in which *Erle*, J., after stating the facts, said (2), "Neither authority nor principle would justify the position that the wrongful removal of a corpse was no misdemeanor if the motive for the act deserved approbation. A purpose of anatomical science would fall within that category. Neither does our law recognise the right of any one child to the corpse of its parent as claimed by the defendant. Our law recognises no property in a corpse, and the protection of

(1) Dea. & Bell. C. C. 160. (2) Dea. & Bell, C. C. 163.

KAY, J.
1882
WILLIAMS v. WILLIAMS.

the grave at common law as contradistinguished from ecclesiastical protection to consecrated ground depends upon this form of indictment; and there is no authority for saying that relationship will justify the taking a corpse away from the grave where it has been buried. We have been unwilling to affirm the conviction on account of our respect for the motives of the defendant, but we have felt it our duty to do so rather than lay down a rule which might lessen the only protection the law affords in respect of the burials of dissenters. The result is that the conviction will stand, and the Judge states that the sentence should be a nominal fine of one shilling."] That judgment entirely justifies my statement that the law of this country recognises no property in a corpse.

The second point of law depends upon the rights of executors with respect to burial. They are stated thus in *Williams* on Executors (1): "It is now proposed to consider the duties of an executor or administrator. And first, he must bury the deceased in a manner suitable to the estate he leaves behind him." And the reference is to the high authority of Mr. Justice *Blackstone*, who states the proposition in the same words (2). It has been argued that this only applies to the expenses of the burial; but I do not agree with that contention. It means, and I understand the law of this country to be, that *primâ facie* the executors are entitled to the possession and are responsible for the burial of a dead body; and if any further authority be wanted, it is to be found in the case of *Reg.* v. *Fox* (3), where a gaoler had refused to deliver up to the executors the body of a person who died while a prisoner, unless they would satisfy certain claims made by the gaoler against the deceased. The Court issued a mandamus, and Lord Chief Justice *Denman* said this: "I think this is a case in which we ought not to wait for a return, but that the mandamus should be peremptory in the first instance. If *Scott* has any answer to give he can do so not by way of return but in shewing cause why an attachment should not issue." In that decision *Williams*, *Coleridge*, and *Wightman*, JJ., concurred,

(1) 6th ed. p. 906.
(2) 2 Bl. Com. 508.
(3) 2 Q. B. 246.

and it is founded on *Reg.* v. *Scott* (1), where a similar event had occurred; and Mr. Justice *Maule* said that the notion of a gaoler being authorized to detain a dead body on account of pecuniary claims was a mistake, and that he would be liable to prosecution. That case shews not merely that a gaoler may not detain the dead body, but that although there is no property in a dead body the executors have such a right of possession that they may obtain a peremptory mandamus against the gaoler who was lawfully in possession of the body of the man while alive to have the dead body delivered up to them. Accordingly the law in this country is clear, that after the death of a man, his executors have a right to the custody and possession of his body (although they have no property in it) until it is properly buried.

It follows that a man cannot by will dispose of his dead body. If there be no property in a dead body it is impossible that by will or any other instrument the body can be disposed of. I asked for any authority in conflict with these cases, but none was produced. I have referred to the books of the greatest authority on the question, and I believe there is no authority in the least degree in conflict with these cases.

It follows that the direction in this codicil to the executors to deliver over the body to Miss *Williams*, who is not one of the executors, is a direction which, in point of law, could not be enforced, and was void. She had no right of property in the body under that direction, nor could she enforce the delivery of the body by the executors. I should have, therefore, no hesitation, if the case stood there, in saying that this direction contained in the codicil was a direction which could not be enforced at law, and was therefore void. Of course the purpose named in the letters cannot make it better or worse. If the purpose had merely been for burial in a particular cemetery, which would be entirely according to the law of this country, that would not make the direction to deliver the body to someone who was not an executor any more legal or enforceable; but the purpose confessedly was to have the body burnt, and thereupon arises a very considerable question whether that is or not a lawful purpose

(1) 2 Q. B. 248, n.

KAY, J. 1882 WILLIAMS v. WILLIAMS.

according to the law of this country. That is a question which I am not going to decide.

But there are two other points, either of which it seems to me would be equally fatal to this claim. The body was buried by the family with the assent of the executors. The testator was a member of the Roman Catholic communion, and I am told that when bodies are buried in ground which is not altogether consecrated, ceremonies take place at the grave which have the effect of blessing the grave; at any rate, the priest, as I understand, pronounces a blessing on the grave, and some consecrated earth is thrown in. All that, I understand, was done at this funeral, and the funeral was perfectly regular, formal, and proper according to the rites of the Church of *Rome*. Now Miss *Williams* at and before the funeral expressed her wish to carry out the desires of the testator. The evidence is that neither the family nor the executors would assent, and accordingly the funeral took place. Afterwards, in March, 1876, she applied to the Secretary of State. [His Lordship then stated the facts as to her application.] I wish to preface all I am going to say on this part of the case by the statement, that in my view this lady considered that she was under a paramount obligation by reason of the duties which she had undertaken to the testator to carry out this wish of his if by any means she could, and I should absolve her, so far as I can form any opinion on the matter, of any intention to do that which was illegal or improper, or in any way *contra bonos mores*. But I observe that by the terms of the codicil the testator certainly contemplated that the cremation should take place before burial, because he directs that the body should be delivered to her three days after death, and that then the costs which she incurred should be repaid to her on production of the vouchers within three months of his death. There can be no kind of doubt, therefore, that what he contemplated was not cremation after interment, but cremation and not interment. [His Lordship then read the answer of the Under-Secretary of State, and observed that his meaning clearly was that no license would be given to remove the body for the purpose of cremation, and that a license would only be given for the purpose of burying the body in con-

secrated ground, if the ground was pointed out and approved of. His Lordship then read the reply of Miss *Williams*, and said that it clearly meant that she had given up the notion of cremation and would adopt the other alternative, and thereupon the license was given, which, of course, proceeded on the supposition that the only purpose for which she intended to remove the body was that of burying it in consecrated ground at *Manafan*. His Lordship then read her letter to the executors, and said that if that had been brought to the attention of the Home Secretary before the body was removed, no doubt the license would have been revoked; and, moreover, if the executors had applied in this Court for an injunction, this Court would have stopped the removal of the body. His Lordship then proceeded:]

It has been argued that the removal for the purpose which this lady certainly represented to the Secretary of State that she had abandoned was a misdemeanor, and there is language in the judgment of Chief Justice *Erle* in the case of *Reg.* v. *Sharpe* (1) which might justify an argument to that effect. That, however, is a point which I am not going to decide. It is enough for me to say that the removal for the purpose of cremation and the cremation were illegal acts. If that alone were the question to be decided it would be impossible for this lady to recover against the estate money for doing that which, if I am right, was an illegal act.

But there remains another point. Supposing it were not an illegal act, could it possibly be said that in a Court of Equity anybody could recover money for the expenses of an act done as this act was done. As I have said, I give the lady credit for the best of motives, but there is no kind of doubt that the act of removing the body by that license, and then burning it, was as distinct a fraud on that license as anything could possibly be. And upon that act, which I hold to be in the view of a Court of Equity a clearly fraudulent act, it is sought to found a claim for the expenses of the cremation. On that ground again, if that were the only ground, I should hold without the least hesitation that those expenses could not be recovered. Again, giving, as I do, this lady credit for feeling herself under a paramount duty, I

(1) Dea. & Bell. C. C. 160.

KAY, J.
1882
WILLIAMS v. WILLIAMS.

must regret extremely that it led her to deceive the Home Secretary into granting her a license for a purpose which she did not intend to carry out.

I must hold that this action fails entirely. For any one of the reasons which I have given, the action would in my opinion be altogether unsustainable, and I dismiss it with costs.

Solicitors for Plaintiff: *Walker & Mewburn-Walker.*

Solicitors for Defendants: *Hemsley & Hemsley; Hollingsworth, Tyerman, & Co.*

C. M.

C. A.
1882
March 15.

BREWER *v.* YORKE.

[1879 B. 578.]

YORKE *v.* BREWER.

[1879 Y. 30.]

Staying Proceedings pending Appeal—Interest—Costs of Sale and Reinvestment.

An order was made by the Court of Appeal directing a sum of Consols in Court to be sold and the proceeds paid to *B.* *Y.* appealed to the House of Lords and after sale but before payment out applied to stay proceedings pending the appeal, asking to have the proceeds of the sale of the fund reinvested and retained in Court:—

Held, that, as a condition of obtaining the order, *Y.* must undertake that in case his appeal was unsuccessful, he would make good the difference between the income actually produced by the fund and interest at £4 per cent. per annum, and would also pay the costs of the sale and reinvestment.

BY an order of the Court of Appeal made on the 10th of February, 1882, it was among other things ordered that £2392 18*s.* 5*d.* Consols standing in Court to the credit of these actions should be sold and the proceeds paid to *Brewer*.

Yorke presented a petition of appeal to the House of Lords, and now applied that pending that appeal all proceedings under the order might be stayed, and in particular that the £2392 18*s.* 5*d.* Consols or the proceeds or dividends thereon might not be dealt with pending the appeal without further order.

The fund had been sold, but the proceeds had not been paid out.

J. Beaumont, for the application, asked that the proceeds of sale might be reinvested.

Glasse, Q.C., and *Lambert*, for the Respondent.

JESSEL, M.R.:—

It is of course to stay the payment out of the moneys, and it is for the benefit of everybody that they should be reinvested, but as the applicant comes here for his own convenience to keep in Court at a low rate of interest a sum which has been ordered to

C. A. 1882 BREWER v. YORKE. YORKE v. BREWER.

be paid to the Respondent, he must undertake, in case his appeal is unsuccessful, to make good the difference between interest at £4 per cent. per annum and the income actually produced by the fund in Court. It is now the practice to make this a condition of staying proceedings. He must also undertake to pay the expenses connected with the sale of the fund and the reinvestment of the proceeds.

COTTON and LINDLEY, L.JJ., concurred.

Solicitor for *Yorke*: *A. Leslie.*
Solicitors for *Brewer*: *Merriman, Pike, & Merriman.*

H. C. J.

C. A. 1882 June 8.

Ex parte BALL. *In re* PARNELL.

Composition Resolutions—Registration—Small Amount of Composition—Abuse of Procedure of Court—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 126 —*Bankruptcy Rules*, 1870, *r.* 295.

The statement of affairs of a debtor, who had filed a liquidation petition, shewed that his debts amounted to £1293, and that he had no assets. At the first meeting of his creditors he admitted in answer to questions put to him that he was in the receipt of a salary of £5 a week. The creditors resolved by the proper statutory majority to accept a composition of 6*d.* in the pound, to be paid within a month after the registration of the resolutions, and to be secured to the satisfaction of the chairman of the meeting. The resolutions were confirmed at the second meeting:—

Held, that the proceedings were an abuse of the process of the Court, and that the resolutions ought not to be registered.

Ex parte Staff (1) approved.

THIS was an appeal from the refusal of Mr. Registrar *Hazlitt*, acting as Chief Judge in Bankruptcy, to rescind the registration of certain composition resolutions which had been passed and confirmed by the proper statutory majorities of the creditors of *Richard Parnell.*

The debtor's statement of affairs shewed that his liabilities amounted to £1293, and that he had no assets. In answer to questions put to him at the first meeting of the creditors, he

(1) Law Rep. 20 Eq. 775.

admitted that he was in the receipt of a salary of £5 a week, as manager of a loan office. The resolutions provided that a composition of 6*d.* in the pound should be accepted in satisfaction of the debts due to the creditors, to be paid within a month after the complete registration of the resolutions, and that the composition should be secured to the satisfaction of the chairman of the meeting. The resolutions were registered, and two dissentient creditors applied to the Registrar, as Chief Judge, to rescind the registration. The application was refused. The applicants appealed.

Cooper-Willis, Q.C., and *J. E. Palmer*, for the Appellants:—

The proceedings are an abuse of the process of the Court. [They were stopped.]

C. H. Turner, for the debtor:—

By the Act the creditors are constituted judges in the matter. There being no assets, 6*d.* in the pound is not a bad composition. In *Ex parte Elworthy* (1) the Chief Judge held that resolutions accepting a composition of 3*d.* in the pound ought to be registered, though the debtor's assets amounted to only £7, and his debts were £130.

[JESSEL, M.R.:—In *Ex parte Staff* (2) the statement of affairs of a liquidating debtor shewed that his debts amounted to £540, and that his assets were £32. The creditors resolved on a liquidation by arrangement and granted the debtor an immediate discharge. One creditor opposed the registration, and the Registrar refused to register them. The Chief Judge characterized the appeal to him as "somewhat audacious." And he said, "Nothing is better settled than this, that the Court of Bankruptcy will not allow its procedure to be made use of for iniquitous or merely idle purposes. In my opinion both these elements exist in the present case . . . This petition is a mere abuse of the procedure in bankruptcy, and the Registrar was quite right in refusing to register the resolutions." In *Ex parte Elworthy* no creditor opposed the registration.]

In *Ex parte Williams* (3) the Chief Judge ordered the registra-

(1) Law Rep. 20 Eq. 742. (2) Law Rep. 20 Eq. 775, 777.
(3) 36 L. T. (N.S.) 324.

C. A. 1882 *Ex parte* BALL. *In re* PARNELL.

tion of resolutions accepting a composition of 6*d.* in the pound, the debtor's liabilities being £1366 and his assets only £50, though two creditors opposed the registration.

JESSEL, M.R. :—

I agree with all that was said by the Chief Judge in *Ex parte Staff* (1). These proceedings are a scandal, a mere abuse of the process of the Court. The registration must be vacated, with costs in both Courts.

LINDLEY, L.J. :—

I agree. I think the proceedings are a scandal.

BOWEN, L.J., concurred.

Solicitors for Appellants: *Barnard & Co.*
Solicitor for Debtor: *S. Chapman.*

W. L. C.

C. A. 1882 *April* 28; *May* 15.

WILLIAMS *v.* PRESTON.

[1881 W. 462.]

Practice — Amendment — Putting in New Defence — Fraud of Solicitor — Rehearing.

Where a solicitor has put in a fraudulent defence for his client without the knowledge of the client, making admissions on which judgment was obtained against the client :—

Held, that the Court had jurisdiction to set aside the judgment and permit the client to withdraw the defence, and put in a fresh defence.

THE Plaintiff in this action alleged in his statement of claim that he had lent money to the amount of about £617 to the Defendant, *Mary Elliott*, who was a married woman, on the security of an agreement to give him a mortgage of certain funds belonging to her, as her separate estate, which were in Court in an action in the Chancery Division, the loan having been made to her through the agency of her solicitor, *W. R. Preston.* The Defendants to the action were Mrs. *Elliott*, her husband, and

(1) Law Rep. 20 Eq. 775.

Preston. The Plaintiff asked that Mrs. *Elliott* might be ordered to execute a valid mortgage to him of the funds in Court: and, in the alternative, if *Preston* had no authority as agent of Mrs. *Elliott* to make the contract, that *Preston* might be charged with the debt and might secure the payment by a mortgage of all sums due to him from Mrs. *Elliott.*

Preston appeared for his co-Defendants in the action and put in a joint defence in which the Defendants admitted that money had been advanced by the Plaintiff to Mrs. *Elliott,* and that whatever moneys had been paid by the Plaintiff to *Preston* had been paid for Mrs. *Elliott's* benefit and had been accounted for to her by *Preston.* The statement of defence was delivered on the 16th of April, 1881, and on the 25th of June *Preston* permitted judgment in the action to be taken, on affidavit of service, declaring among other things that the Plaintiff was entitled to a charge on the fund in Court for £647 with interest.

Mrs. *Elliott's* husband died on the 14th of July, 1881, and in the same month *Preston* absconded and soon afterwards was adjudicated bankrupt.

On the 25th of August Mrs. *Elliott* was served with the judgment, and then for the first time became aware of the nature of the defence that had been put in, and of the terms of the judgment.

On the 10th of September Mrs. *Elliott* obtained an order to change her solicitor, and on the 6th of January, 1882, the Plaintiff obtained an order to continue the action against the trustee in *Preston's* bankruptcy.

Mrs. *Elliott* now appealed against the judgment of the 25th of June, 1881, and at the same time moved that the action might be reheard, and that she might be at liberty to withdraw her defence, and to deliver a fresh defence, and to adduce fresh evidence.

The ground for the application was that *Preston* had no authority to borrow any money from the Plaintiff on her behalf, and that he had acted fraudulently and without authority in putting in the statement of defence and suffering judgment.

Mrs. *Elliott* filed an affidavit stating that the admissions in the statement of defence were untrue, and that it had been put in

C. A. 1882 WILLIAMS v. PRESTON.

fraudulently without her knowledge: that she had never authorized *Preston* to borrow money from the Plaintiff for her, and had never received the money which was said to have been borrowed.

Romer, Q.C., and *H. B. Buckley*, for the Appellant:—

The authority of a solicitor in an action does not extend to the commission of a fraud. If there had been a *bonâ fide* mistake, the client might have been bound by the solicitor's act; but the Court will always interfere to relieve the client against a fraud: *De Roufigny* v. *Peale* (1); *Newbiggin-by-the-Sea Gas Company* v. *Armstrong* (2).

Ince, Q.C., and *Jason Smith*, for the Plaintiff:—

Assuming that the conduct of the solicitor has been fraudulent, which has not yet been proved, the Defendant's remedy is by taking proceedings against him. The Plaintiff is entirely innocent of the fraud, and is entitled to rely on the authority of the solicitor. A party in an action places himself in the hands of his solicitor as to all matters within the scope of his authority, and cannot evade the consequences by alleging mistake or fraud on his part: *Chown* v. *Parrott* (3); *Dundas* v. *Dutens* (4); *Young* v. *Wright* (5); *Fray* v. *Vowles* (6); *Prestwick* v. *Poley* (7); *Pulling* on Attorneys (8); *Lush's* Practice (9).

Deane, for *Preston's* trustee.

LORD COLERIDGE, L.C.J.:—

We are all satisfied that this being a question of rehearing we have jurisdiction to grant this application, and that if the allegations of fraud should be established we ought to exercise it. The question as to the terms on which this should be done must be reserved. We think that the proper order will be to fix a day for the hearing of the case, and the Defendant will then produce her evidence of fraud before the fresh statement of defence is put

(1) 3 Taunt. 484.
(2) 13 Ch. D. 310.
(3) 32 L. J. (C.P.) 197.
(4) 1 Ves. 196.
(5) 1 Camp. 139.
(6) 1 E. & E. 839.
(7) 34 L. J. (C.P.) 189.
(8) Page 102.
(9) 3rd Ed. p. 250.

in. We cannot assume that she has made out her case till we have heard the evidence. She must prepare her statement of defence and give notice of it to the Plaintiff, and if, on hearing the evidence, we think the fraud is established, we shall treat the defence as having been put in, and we will hear the appeal. The Plaintiff must therefore be prepared with his evidence in support of his action. The only order we make now is to fix the 15th of May for the further hearing of the case.

LINDLEY and HOLKER, L.JJ., concurred.

May 15, 1882. On this day the witnesses were heard, and the Court came to the conclusion that Mr. *Preston* had no authority to borrow money for Mrs. *Elliott*, and that the defence had been put in fraudulently by *Preston*. Leave was therefore given to have a rehearing of the action and for Mrs. *Elliott* to put in a new statement of defence, which had been already prepared, and to make use of the evidence which had been adduced.

At the request of both parties the Court reheard the action at once. The Court gave judgment for Mrs. *Elliott* and dismissed the action with costs.

Solicitors: *Wolferstan, Avery & Jennings; E. J. Lewis; Morley & Shirreff.*

M. W.

C. A.
1882
FRY, J.
Feb. 24, 25.
C. A.
May 3.

In re OVEY.

BROADBENT *v.* BARROW.

[1881 O. 282.]

Will—Construction—Specific Legacy.

The fact that a specific legacy is given, or a specific part of the personalty excepted, out of a general residue, does not make a gift of that general residue specific.

A testator by his will bequeathed a number of pecuniary legacies. And he gave all his personal estate of which he should die possessed, and which should not consist of money or securities for money, to *E. A. Robertson* absolutely. And he gave and devised all the rest, residue, and remainder of his estate, both real and personal, to his executors, upon certain trusts :—

Held, reversing the decision of *Fry*, J., that the bequest to *E. A. Robertson* was not specific.

Bothamley v. *Sherson* (1) explained.

ADJOURNED SUMMONS.

This action was brought for the administration of the real and personal estate of *Henry Ovey*, who died on the 19th of June, 1881.

The testator by his will, dated the 1st of June, 1881, bequeathed a number of pecuniary legacies, some of which were to charities. And he gave all his personal estate and effects of which he should die possessed, and which should not consist of money or securities for money, unto *Elizabeth Anne Robertson* for her own use and benefit absolutely. And he gave and devised all the rest, residue, and remainder of his estate, both real and personal, whatsoever and wheresoever, to the Defendants (whom he had previously appointed executors and trustees of his will), upon trust thereout to pay two legacies of £500 and £100, and as to the residue thereof, or such parts thereof as might lawfully be appropriated for the purpose, for such one or more hospitals, and in such proportions as his trustees might think fit. And he directed that all the legacies given by his will should be paid free of legacy duty, and also that the aforesaid pecuniary legacies for charitable

(1) Law Rep. 20 Eq. 304.

purposes should be paid exclusively out of such part of his personal estate as might lawfully be appropriated to such purposes and preferably to any other payment thereout. And he empowered his executors and trustees at their discretion to sell and convert into money all or any part of his real estate.

The testator's personal estate was valued for the purpose of probate at under £39,660, of which about £30,000 consisted of money, and securities for money. His real estate was worth about £20,000. The pecuniary legacies bequeathed by his will amounted to £49,400, of which £7600 were given to charitable purposes.

On the 27th of July, 1881, an administration judgment was given in the action.

The question was now raised, upon a summons for the redelivery to the executors of certain chattels which had been given up to Mrs. *Robertson*, taken out by some persons who had obtained liberty to attend the proceedings, whether the bequest to *Elizabeth Anne Robertson* was specific or residuary, and whether therefore it was or was not subject to the payment of the pecuniary legacies.

The summons came on to be heard before Mr. Justice *Fry* on the 24th of February, 1882.

Fischer, Q.C., and *Stirling*, for the summons:—

The gift to Mrs. *Robertson* is general or residuary, not specific; *Roper* on Legacies (1); *Sayer* v. *Sayer* (2); *Nisbett* v. *Murray* (3); *Howe* v. *Earl Dartmouth* (4). In order to determine whether a legacy is specific or not, the state of the testator's assets at the date of his will may be looked at: *Williams* on Executors (5); *Boys* v. *Williams* (6). The fact that one residuary gift is followed by another does not exonerate the property comprised in the first from liability to pay the pecuniary legacies, though it may be that the property comprised in the second residuary gift must be first applied to that purpose: *Ouseley* v. *Anstruther* (7); *Greville* v. *Browne* (8).

(1) 4th Ed. vol. i. p. 242.
(2) 2 Vern. 688.
(3) 5 Ves. 149.
(4) 7 Ves. 137.
(5) 8th Ed. vol. ii. p. 1172.
(6) 2 Russ. & My. 689.
(7) 10 Beav. 453.
(8) 7 H. L. C. 689.

C. A. 1882

In re OVEY. BROADBENT *v.* BARROW.

Cecil Russell, for the Attorney-General, as representing the charities, supported the summons:—

Some of the charitable legacies may be payable out of impure personalty, because the legatees will be able to select objects which will not violate the *Statute of Mortmain*: *Lewis* v. *Allenby* (1). Personal estate can be exonerated from the payment of debts and legacies only by plain words.

John Pearson, Q.C., and *Sturges*, for Mrs. *Robertson*:—

The legacy to Mrs. *Robertson* comes exactly within the definition of a specific legacy given by the Master of the Rolls in *Bothamley* v. *Sherson* (2). The question is one of intention: *Powell* v. *Riley* (3); *Fielding* v. *Preston* (4). The testator might have enumerated all the particulars of the personal estate which he gives to Mrs. *Robertson*, then the gift would clearly have been specific. Instead of doing that, he uses a general description with an exception from it. It comes to the same thing.

Cookson, Q.C., and *Borthwick*, for the executors:—

A specific legacy is not necessarily subject to ademption: *Stephenson* v. *Dowson* (5); *Bethune* v. *Kennedy* (6).

Fischer, in reply.

FRY, J.:—

The question is, whether the bequest to Mrs. *Robertson* is or is not specific. [His Lordship referred to the provisions of the will, and read the bequest to Mrs. *Robertson*, and the subsequent gift of residue to the trustees, and continued:—] Upon this two observations arise. The first is, that the testator, having made an exception from the gift to Mrs. *Robertson*, does not confine the subsequent gift to the property which he has excepted from the prior gift, but gives to them "all the rest, residue, and remainder" of his estate, both real and personal. The second observation is this, that the testator in describing the property

(1) Law Rep. 10 Eq. 668.
(2) Law Rep. 20 Eq. 304.
(3) Law Rep. 12 Eq. 175.
(4) 1 De G. & J. 438.
(5) 3 Beav. 342.
(6) 1 My. & Cr. 114.

which he gives to the trustees, has used the words "rest, residue, and remainder." Both these observations tend, I think, strongly to shew that he intended the gift to the trustees, and that he did not intend the gift to Mrs. *Robertson*, to be residuary. I now proceed to inquire whether the gift to Mrs. *Robertson* has or has not the notes or characteristics of a specific legacy. These characteristics have been defined by the present Master of the Rolls in the case of *Bothamley* v. *Sherson* (1), and, though he then said that he expressed the hope that his definition would be more successful than those which had been previously attempted "with some trepidation," I feel myself at liberty to follow his definition. He says that a specific bequest must, in the first place, be a bequest of a part of the testator's property; that, secondly, it must be a bequest of a part emphatically, as distinguished from the whole; and that, thirdly, the part may be defined with reference either to the date of the will or to the time of the testator's death. If it is defined with reference to the date of the will it is liable to ademption; in the other case it is not. Does then the gift to Mrs. *Robertson* satisfy these conditions? In my opinion it does. In the first place, it is a gift of property of which the testator shall be possessed at the time of his death. In the next place, it is a gift of a part only of that property, and not of the whole. The only difficulty is that the exception from the gift appears to be in its terms more specific than the gift itself. But that difficulty is, I think, met by the observation which I have already made, that the gift to the trustees is a gift, not only of the excepted property, but of all the "rest, residue, and remainder" of the testator's estate. The gift to Mrs. *Robertson*, therefore, appears to me to satisfy all the conditions of a specific legacy as defined by the Master of the Rolls in *Bothamley* v. *Sherson*. But supposing that it is not a specific legacy, is it a residuary gift, or is it a general legacy? A general legacy is one which must be satisfied out of the testator's assets without reference to the nature of the property which he had at the date of his will or at the time of his death. The simplest illustration is the case of a gift of £1000 to *A*. To such a legacy effect must be given whether the testator had or had not 1000 sovereigns at the time of his death.

(1) Law Rep. 20 Eq. 304.

C. A. 1882 — *In re* OVEY. BROADBENT *v.* BARROW. — Fry, J.

That is a general legacy, and the £1000 must be raised out of the testator's assets, whatever they may be, and paid to the legatee. But here the property given to Mrs. *Robertson* is described by the will with reference to the property of which the testator shall die possessed. It is, therefore, clearly not a general legacy. Again, is it a residuary gift? It is general in its terms, and it would have been residuary but for the exception out of it, and but for the fact that the subsequent gift to the trustees is described as a gift of residue. But suppose that a lapse of any of the pecuniary legacies had occurred, by reason of the death of the legatee in the lifetime of the testator, into which gift would the lapsed legacy have fallen, that to Mrs. *Robertson* or that to the trustees? Clearly it would fall into the gift to the trustees. And that shews that the gift to the trustees, and not that to Mrs. *Robertson*, is residuary. Again, suppose that the gift to Mrs. *Robertson* had lapsed by her death before the testator, would the property given to her have gone to the trustees, or would it have gone to the testator's next of kin as undisposed of by the will? Certainly it would have gone to the trustees. This shews that the gift to the trustees is residuary, and that the gift to Mrs. *Robertson* is not. I come, therefore, to the conclusion that the gift to Mrs. *Robertson* is specific, and I dismiss the summons.

W. L. C.

C. A.

From this decision the applicants appealed.

The appeal was heard on the 3rd of May, 1882.

Fischer, Q.C., and *Stirling*, for the Appellants, in addition to the case cited in the Court below, referred to *Allan* v. *Gott* (1).

J. Pearson, Q.C., and *Sturges*, for Mrs. *Robertson*.

Cookson, Q.C., and *Borthwick*, for the executors.

Fischer, in reply.

JESSEL, M.R.:—

This appeal from Mr. Justice *Fry* turns upon the construction of special words in a very obscure instrument. But there are

(1) Law Rep. 7 Ch. 439.

some principles well settled which will enable us to come to a conclusion as to the proper sense to be attached to the words used; for what the real meaning of the testator was I have not the slightest idea.

Now it is a curious thing that Mr. Justice *Fry* in giving his judgment has specially referred to a case decided by me, *Botham-ley* v. *Sherson* (1), and has considered that he was following it. It does not appear to me that I can have expressed myself with clearness, because the learned Judge has put a construction upon my words which is quite different from what I meant. Therefore I think that I ought to explain my meaning in that case. What I am reported to have said there, speaking of a specific bequest, is this (2): "In the first place, it is a part of the testator's property;" and then again, "In the next place, it must be a part emphatically as distinguished from the whole. It must be what has been sometimes called a severed or distinguished part. It must not be the whole in the meaning of being the totality of the testator's property, or the totality of the general residue of his property after having given legacies out of it. But if it satisfy both conditions, that it is a part of the testator's property itself, and is a part as distinguished, as I said before, from the whole or from the whole of the residue, then it appears to me to satisfy everything that is required to treat it as a specific legacy. I hope the definition which I have attempted to give will be more successful than those which have been attempted before, but I can only express that hope with some degree of trepidation."

Now Mr. Justice *Fry* reads that passage in this way: "The Master of the Rolls says that a specific bequest must in the first place be a bequest of a part of the testator's property; that, secondly, it must be a bequest of a part emphatically as distinguished from the whole; and that, thirdly, the part may be defined with reference either to the date of the will, or to the time of the testator's death. If it is defined with reference to the date of the will it is liable to ademption, in the other case it is not. Does then the gift to Mrs. *Robertson* satisfy these conditions? In my opinion it does. In the first place, it is a gift of property of which the testator shall be possessed at the time of

(1) Law Rep. 20 Eq. 304. (2) Law Rep. 20 Eq. 308, 309.

C. A. 1882 *In re* OVEY. BROADBENT *v.* BARROW. Jessel, M.R.

his death. In the next place, it is a gift of a part only of that property, and not of the whole. The only difficulty is that the exception from the gift appears to be in its terms more specific than the gift itself. But that difficulty is, I think, met by the observation which I have already made, that the gift to the trustees is a gift not only of the excepted property, but of all the 'rest, residue, and remainder' of the testator's estate. The gift to Mrs. *Robertson*, therefore, appears to me to satisfy all the conditions of a specific legacy, as defined by the Master of the Rolls in *Bothamley* v. *Sherson* (1)."

But it does not appear to me that the gift to Mrs. *Robertson* does satisfy the second condition that I there laid down. I said that the thing given must be "severed," and that it must not be the whole of the testator's property after having given legacies out of it; and it makes no difference, according to my definition, whether a specific legacy has been given out of it, or something excepted from it. What I intended to say was that a general residue cannot be deemed to be given specifically, even though a specific legacy has been given out of it; it does not for that reason become itself a specific legacy, it is still a general residue.

Now we come to the question in this case, Is this gift to Mrs. *Robertson* specific? Are the legacies to be paid out of it or not? The testator has directed his executors to pay his debts. Out of what? Clearly out of the personal estate, out of which they are payable by law. Then he gives a number of legacies, some charitable and some not, but all pecuniary. What is the effect of that? It amounts to a direction to his executors to pay the legacies out of his personal estate: he need not say so; the mere gift of the legacies carries that direction with it. Then he gives to Mrs. *Robertson* a legacy, also pecuniary; and then comes the gift to Mrs. *Robertson*, on which this question has arisen, followed by the gift to his executors upon certain trusts. [His Lordship read the clause set forth above.] His will was written by his solicitor and attested by his clerk.

What, then, is the effect of this direction, that Mrs. *Robertson* is to take the personal estate? It follows from what I have said

(1) Law Rep. 20 Eq. 304.

before that it cannot be a specific bequest, for it is not a distinguished part. The only thing which is "distinguished" is what is excepted out of it. It is therefore a general gift of personal estate. Then is there anything in the will which exempts the general personal estate from its legal liabilities? It is said that the subsequent gift of the "residue" has that effect. There is no doubt that the gift of residue will carry the money and securities for money, but will it carry anything else? In my opinion, when the testator gives all his personal estate except money and securities for money to one person, and then the residue to another person, he must be taken to include in the gift of the residue the money and securities for money, and nothing else, because, by law, he is supposed to anticipate that the legatee of the personal estate would survive him. Therefore, my opinion is that the gift of residue refers to the money and securities for money only. But does the testator mean that the money and securities for money are to be the only fund for payment of pecuniary legacies? What is the law? The law is that the general personal estate is the fund out of which debts and legacies are to be paid, and to exonerate it you must find some special words for that purpose. It is the law, and not the use of the word "residue," that renders property included in a gift of residue liable to pay legacies. Are there then here any words which as regards Mrs. *Robertson* and the trustees exonerate either of them from this liability? I can find no such words. On the other hand, there are words which appear to my mind rather in favour of the oneration of Mrs. *Robertson's* gift; namely, the direction to pay the charitable legacies out of "such part of my personal estate as may lawfully be appropriated to such purposes;" he does not say "out of my residuary personal estate." Now I do not know what the testator meant by that, but I know very well what the words mean. There is an express direction that the charity legacies should be paid out of personal estate, and, as I have shewn, that must include the gift to Mrs. *Robertson*, and if the charity legacies are to be paid out of that, why not the other legacies? So that not only are there no expressions which exonerate the general personal estate, but words which onerate it. Therefore, the result is in the first place, that the gift to Mrs. *Robertson* is not

C. A. 1882

In re Ovey.

Broadbent v. Barrow.

specific; and, secondly, that the legacies must be paid in full out of the personal estate, including the gift to Mrs. *Robertson*.

The decision appealed from must therefore be reversed.

Lindley, L.J.:—

The point we have to decide is a narrow and technical one, and is, whether a certain gift in a will is a specific legacy, the object being to determine whether it is subject to the payment of the pecuniary legacies. Upon this narrow question I am not able to take the same view as Mr. Justice *Fry*. I shall not attempt to give a definition of a specific legacy, I will accept the definition given in *Williams* on Executors (1), which I think is sufficient for this purpose, although not an exhaustive one; namely, that it is "a bequest of a specified part of the testator's personal estate which is so distinguished." Does this gift come within the definition? I think it does not. It is true that it does not follow that because what is given fluctuates, it is not a specific bequest, as in the case of furniture in a particular house; but this gift is something of a different nature; it is quite general, it is not a part distinguished from the rest. Then if we look at the context, is there anything to lead us to a different conclusion? The testator gives all the rest, residue, and remainder of his real and personal estate to trustees upon certain trusts. That residuary clause does not seem to me to alter the construction of the previous bequest so as to convert it into a specific legacy.

Then we come to the substantial question in this case, in what order the assets are to be administered? I say nothing about the real estate. But confining our attention to the personal estate, we have certain legacies to be paid, and nothing being said about the fund out of which they are to be paid, they are *primâ facie* to be paid out of the personal estate. Then here we have a general bequest of personal estate, except moneys and securities for money; and then we have a further bequest of all the residue of the personal estate—that is, of the money and securities for money. Therefore the legacies will be paid primarily out of that residue, and if that is exhausted they must come out of the personal

(1) 8th Ed. p. 1163.

estate generally; that is, out of the gift to Mrs. *Robertson*. They can come out of nothing else. On the question whether the real estate may not be also liable I give no opinion.

HOLKER, L.J.:—

I am of the same opinion.

Solicitors: *S. Copping; Lawford, Waterhouse, & Lawford; Young, Jones, Roberts, & Hale; Solicitor to the Treasury.*

M. W.

Ex parte HARPER. *In re* POOLEY.

Solicitor to Trustee in Bankruptcy—Right to Costs out of Estate—Discretion of Court—Improper Conduct—Abuse of Bankruptcy Law—Taxation of Costs—Power of Court to go behind Allocatur.

The right of the solicitor to a trustee in bankruptcy to be paid his costs out of the bankrupt's estate is only the right of his client, the trustee; he has no independent right. If either the trustee or the solicitor has been guilty of misconduct, the Court can refuse to allow the solicitor's costs to be paid out of the estate, and this notwithstanding that the costs have been taxed and an *allocatur* has been made by the Taxing Master.

It is an abuse of the bankruptcy law to purchase a debt due by a bankrupt in order to procure the appointment of a trustee favourable to the bankrupt or to a creditor or a particular class of creditors, or to purchase a debt for the purpose of making the debtor (*e.g.*, the trustee in a bankruptcy) a bankrupt with the view, not of recovering the debt, but of putting pressure upon him for a collateral object, or of injuring him in some way.

Ex parte Griffin (1) approved and followed.

The trustee in a bankruptcy and his solicitor having been engaged in transactions of this kind, the Court, after taxation of the solicitor's costs, refused to allow them to be paid out of the bankrupt's estate.

THIS was an appeal from a decision of Mr. Registrar *Hazlitt*, acting as Chief Judge in Bankruptcy.

A. G. Pooley was adjudicated a bankrupt on the 22nd of October, 1879. A Mr. *Sheard* was appointed trustee in the bankruptcy, and a Mr. *Harper* acted as his solicitor. *Sheard* was afterwards removed by the Court (*vide Ex parte Sheard* (2)) and a Mr. *Holt* was appointed trustee in his place. After the removal

(1) 12 Ch. D. 480. (2) 16 Ch. D. 107.

C. A. 1882

Ex parte HARPER. *In re* POOLEY.

Harper carried in his bill of costs as solicitor to *Sheard* for taxation. The costs were taxed at £128 12*s.* 11*d.*, and the Taxing Master made his *allocatur* for that sum. *Harper* then applied for an order that the trustee should pay the amount out of the bankrupt's estate. The application was opposed by the trustee, on the ground that both *Sheard* and *Harper* had been guilty of misconduct which disentitled them to receive costs out of the estate. The Registrar, however, held that he could not go behind the *allocatur*, and he ordered the costs to be paid out of the estate. The trustee appealed.

The appeal came on to be heard on the 19th of January, 1882.

Crump, for the Appellant:—

The *allocatur* is not conclusive as to the solicitor's right to be paid out of the estate. *Sheard* and *Harper* conspired with other persons to damage the estate.

[JESSEL, M.R.:—You had an opportunity of attending before the Taxing Master.]

I could not object to any item in the bill. My case is that the conduct of the trustee and of the solicitor have been so improper that the Court will not allow a penny of costs to be paid to them out of the estate. If an action had been brought by the solicitor, there could have been a good counter-claim by the trustee. Why should I be in a worse position in the Court of Bankruptcy than in a Court of Law? I am willing to bring an action, but meanwhile the money ought not to be paid.

Winslow, Q.C., and *E. Cooper Willis*, for *Harper*:—

[JESSEL, M.R.:—The Court of Bankruptcy is a Court of Equity as well as of Law. In Equity a trustee who commits a fraud forfeits his right to costs out of the bankrupt's estate. *Harper* cannot stand in a better position than his client *Sheard*.]

A solicitor is an officer of the Court, and is entitled to be paid for the work which he has done. To deprive him of costs it must be shewn that he was a party to the alleged fraud.

THE COURT (*Jessel*, M.R., and *Brett* and *Holker*, L.JJ.), discharged the order of the Registrar, and referred the case back to

him, with an expression of their opinion that he was at liberty to go behind the *allocatur* of the Taxing Master, and to investigate the charges of improper conduct.

The case was then heard by the Register upon the evidence, and he held that the charges of improper conduct had been established, and refused to order the costs to be paid out of the estate. *Harper* appealed.

The appeal was heard on the 4th of May, 1882.

The material facts appear in the judgments of the Court.

Winslow, Q.C., and *Cooper Willis*, Q.C., for the Appellant.

Crump, and *Finlay Knight*, for the trustee, were not heard.

JESSEL, M.R.:—

This is an appeal from a decision of Mr. Registrar *Hazlitt*, sitting as Chief Judge, who has refused to allow the payment out of the bankrupt's estate of a bill of costs due to the Appellant as solicitor to Mr. *Sheard*, who was trustee in the bankruptcy until he was removed, and Mr. *Holt* was appointed in his place.

The ground on which the costs have been refused appears to me to be very simple and very plain. The solicitor's right to the costs is simply the right of his client, Mr. *Sheard*. He has no independent right. Of course he has, or may have, a right of action against his client. I do not know what the terms were on which Mr. *Sheard* employed Mr. *Harper*, but he has a right of action against Mr. *Sheard* if there were no special terms, and that is his only legal right. In an ordinary case Mr. *Sheard*, as trustee, would, if he had conducted himself properly, have a right to be indemnified out of the trust estate, and, according to the ordinary rule, the Court allows the solicitor to be paid directly out of the estate, instead of making him sue his client, and then allowing the client to come and ask to be indemnified again. The present application is made under that rule.

Now the Registrar has declined to allow the costs to be paid out of the estate, because Mr. *Sheard* has behaved in a way which would disentitle him to costs, and because Mr. *Harper* also has behaved in a way which would disentitle him to the costs. In

C. A. 1882 *Ex parte* HARPER. *In re* POOLEY. Jessel, M.R.

other words, the Registrar has come to the conclusion, first, that there has been misconduct proved against Mr. *Sheard*, the trustee, which would disentitle him to costs, and consequently would disentitle his solicitor to costs; and, secondly, that personal misconduct has been proved against Mr. *Harper*, which, so far as this estate is concerned, would disentitle him to costs, the payment of the costs out of the estate being discretionary. I am sorry to say that I cannot dissent from the conclusion of the Registrar on either point.

I will state what has happened in this case. I hope this sort of thing is not frequent, but I am afraid it does happen sometimes as regards the mode of appointing the trustee under a bankruptcy. The bankrupt had some interest in a railway in *Jersey*. He had mortgaged this interest to the *Metropolitan Bank*, and had made a further charge upon it in favour of his then solicitor. Subject to those charges, he appears to have been entitled to the railway. He had two sons, *Rodney Pooley* and *Thomas Pooley*. *Rodney Pooley* seems to have taken a very active interest in the matter, and to have employed Mr. *Harper* as his solicitor. *Thomas Pooley* comes on the scene only incidentally in the way which I am about to mention.

The *Metropolitan Bank* appear to have taken a step which I cannot conceive to have been justifiable. They had instituted a suit in Chancery against the bankrupt to compel the payment out of the *Jersey Railway* of the moneys due to them, and they had obtained in that suit an order for the appointment of a receiver, but they could not make the order effectual, because, for some reason or other which I do not rightly understand, the *Jersey* Courts refused to give effect to the receivership order. Thereupon the *Metropolitan Bank*, or some one on their behalf, bought up a debt due by the bankrupt, as to which bankruptcy proceedings had been begun against him, on the terms that those proceedings should be continued, and that he should be made a bankrupt, the object being obviously that they should get possession of the *Jersey Railway*. Well, under those proceedings, *A. G. Pooley* was made a bankrupt. He evidently wished that the trustee in the bankruptcy should be a creature of his own, somebody who would act on his behalf, not necessarily hostile to the

creditors, because, of course, if there was a surplus, that would be to some extent to their benefit; they would get paid in full. But the object was to get a trustee who should be his trustee, as distinguished from the estate trustee. And the way in which it was managed was this. The bankrupt appeared to owe a large sum of money, several thousand pounds, to one *Lovelock*. I do not know whether he really did owe it or not, for the whole of these transactions strike me as requiring very careful investigation, but that is the state of matters which appeared. As to a part of that debt, some £200 of it, I think *Rodney Pooley* had become surety for his father, and some months before the bankruptcy there had been an arrangement for the buying up of *Lovelock's* debt by *Rodney Pooley*, but subject to a proviso that the arrangement should come to an end in case of bankruptcy. Well, that being so, when the bankruptcy took place, of course the arrangement came to an end.

And now I must state something about Mr. *Lovelock*. He was not the real creditor, but only the nominal creditor. He was the official liquidator in the winding-up of another bank, which was then being wound up under the direction of the Court of Chancery, and the debt was due to him in that capacity. Of course, when the bankruptcy took place, there was no obligation on the part of Mr. *Lovelock* to transfer the debt to Mr. *Rodney Pooley*, but it seems (I am drawing these inferences from the evidence, which is not as plain as it might be, and I am obliged to draw the best inference I can) that Mr. *Rodney Pooley*, and his father and Mr. *Harper* (that is my conclusion) all wished to get Mr. *Lovelock's* debt transferred to Mr. *Rodney Pooley* with the view of using it for the purpose of voting for the trustee in the bankruptcy and securing the appointment of a friendly trustee. That Mr. *Harper* knew this, is, I think, plain. They make an arrangement with Mr. *Lovelock* to buy up the debt, and they make it in such terms that when they go to the Chief Clerk to confirm it (the sanction of the Judge who had the conduct of the winding-up to the compromise being required), he said, "No, I will not confirm this. It is not an honest compromise of a debt; it is nominally the purchase of a debt, but it is really the purchase of a vote for the choice of a trustee." He refused to sanction it, and

C. A. 1882 *Ex parte* HARPER. *In re* POOLEY. Jessel, M.R.

a statement of his refusal and the motive for it was made to Mr. *Harper* in a letter written by Mr. *Lovelock's* solicitor the very day before the choice of a trustee.

Well, that being so, Mr. *Harper* knew perfectly well the view which the Chief Clerk took, and what does he do? He makes an appointment for Mr. *Rodney Pooley* to meet Mr. *Lovelock* and arrange to get this debt into the hands of Mr. *Rodney Pooley*. An arrangement is made accordingly, and the debt is agreed to be assigned, I think for £225, and thereupon Mr. *Harper* sends Mr. *Lovelock*, or his solicitor, it does not matter which, a cheque for the £225, which he draws on his own bank. He got the money in this way. It appears that the solicitor who was employed by the bankrupt in *Jersey* at the time of the bankruptcy forwarded the money for the purchase of this debt to Mr. *Harper*. Whether he lent it to Mr. *Rodney Pooley* I do not know, but he forwarded it through Mr. *Rodney Pooley* to Mr. *Harper*, who paid Mr. *Lovelock* out of the money so handed to him. The result was that in this way they got the vote of Mr. *Lovelock*, who was nominally this very large creditor, to carry the choice of the trustee in the bankruptcy.

I may mention that besides this they got some other votes from *Jersey*. I do not much rely upon them. It afterwards happened in the bankruptcy that those votes were struck out, and I do not much rely upon that, because, although they were expunged, it is very likely that the debts were thought not worth proving from the state of the assets, the creditors living in *Jersey*, and there being no hope of a genuine dividend.

Under these circumstances the trustee is appointed, a friendly trustee to the bankrupt. Any grosser abuse of the bankruptcy law than the whole story from beginning to end, I cannot well imagine. Whether there was an indictable conspiracy it is not for me to say here, but that is the way in which this friendly trustee was appointed.

Now who is this friendly trustee? The friendly trustee is Mr. *Sheard*. And who is Mr. *Sheard?* It appears that Mr. *Thomas Pooley* was the editor of a newspaper called the *Brewers' Guardian*, and among his clerks was a man named *Sheard*, who was employed at a salary of £2 5*s*. a week to keep the books. And this was the

man whom they appointed as trustee. He was, it appears, asked by Mr. *Rodney Pooley* to be the trustee, or rather *Rodney Pooley* asked *Thomas Pooley* to ask him to be trustee, and they appointed him as trustee, describing him as an accountant. Mr. *Harper* was not personally a party to the actual appointment; his clerk, it appears, attended when the appointment was made. That is the sort of man they put in as trustee, as a proper person to administer the estate of the bankrupt.

The whole thing from beginning to end was a simple arrangement between the bankrupt and his sons to get his own "tool," as he has been called by the Registrar, an expression which was adopted by myself on a previous occasion, appointed trustee of the bankrupt's estate. It was, as Mr. *Winslow* described it, a kind of counter-move on the part of the bankrupt and his sons to the proceedings taken on behalf of the *Metropolitan Bank*. Here again, I cannot help saying that, whether the *Metropolitan Bank's* proceedings were any better or any worse than those adopted on behalf of the bankrupt, his solicitor, and his sons, it cannot affect the question of the propriety of their proceedings, and I wish to say as distinctly as I can, without using unnecessarily strong or harsh terms, that from beginning to end, as regards the appointment of the trustee, the conduct of the bankrupt, of his sons, of Mr. *Sheard*, and of Mr. *Harper*, deserves the strongest reprehension of the Court, as being an abuse of the bankruptcy laws, and an improper attempt to obtain by improper means the appointment of an improper person as trustee of the bankrupt's estate.

Can a man so appointed, a man who has obtained the appointment, not for the honest purpose of protecting the bankrupt's estate and administering it, but for the purpose of furthering the interests of the bankrupt himself, be a man who is entitled to costs out of the estate in respect of his conduct of the proceedings? How can the Court manifest its displeasure and disapproval in a better or more effectual way, as regards similar proceedings in future, than by depriving the trustee of his costs? The Registrar has done so, and I entirely concur in the propriety of his decision.

I now come to the second part of the case, and I cannot pass that over, because, if I am right in the inferences which I draw from the evidence, the most censurable course has been adopted

C. A. 1882 — *Ex parte* HARPER. *In re* POOLEY. — Jessel, M.R.

again by Mr. *Rodney Pooley* and Mr. *Harper*. Mr. *Holt* in May, 1880, was appointed, no doubt at the instance of the *Metropolitan Bank*, to be the trustee of the estate in succession to Mr. *Sheard* who had been removed, and it appears that Mr. *Rodney Pooley* instructed Mr. *Harper* to buy up a debt due by Mr. *Holt*, with the view and for the purpose of making Mr. *Holt* a bankrupt. The object of making him a bankrupt was to get him removed from being trustee of this estate, he having turned out to be a hostile trustee as regards the bankrupt. The debt was purchased and a debtor's summons was issued against Mr. *Holt*. What became of it I do not know; I am told the proceedings went no further. Why they went no further I do not know.

Now what was the reason, the known reason, for this intervention of Mr. *Rodney Pooley?* He was so impecunious that, when he had to buy *Lovelock's* debt for £225, it was only through the assistance of the *Jersey* solicitor that he could procure the money. Why does he want to buy up the debt due from Mr. *Holt?* Mr. *Winslow* suggested that any man might speculate in debts. So he may, but Mr. *Harper* in his examination was asked the question, was it not with the view of making Mr. *Holt* a bankrupt, and he declined to answer, and then the Registrar said in his presence that he must take it to be the same thing as if he had answered in the affirmative. That is the effect of the Registrar's observation, and I think it is a fair observation. I must take it, therefore, that Mr. *Harper* knew that the object of buying up this debt was, not the recovery of the debt, but to make Mr. *Holt* a bankrupt, and (as I consider to be the fair inference) with the view of removing him from being trustee. But, even if it goes no further than the first proposition, it is a gross abuse of the bankruptcy laws. And we must recollect that all this occurred after the well-known judgment, a judgment which made a great noise in the profession, in *Ex parte Griffin* (1), which was delivered in July, 1879, and in which Lord Justice *Cotton* said (2): "The proceedings in bankruptcy were not taken to obtain payment of the debt, but the debt was purchased in order to take the proceedings in bankruptcy," and Lord Justice *James* added that he entirely agreed with that, and that after what Lord Justice *Cotton*

(1) 12 Ch. D. 480. (2) 12 Ch. D. 483.

had said "people will probably think twice before they buy debts for the purpose of taking bankruptcy proceedings." Now a solicitor, who after that chooses to be concerned in buying up a debt with the view of taking bankruptcy proceedings, cannot complain if his conduct is viewed with disapprobation by a Court of Justice. I am not by any means prepared to say (although I disapprove of the conduct of the solicitor in the matter) that, this having occurred after the removal of his client from being trustee, and no injury having in fact been done to the estate by his conduct, it alone would have afforded a sufficient ground for refusing him his costs. But I do not say that the learned Registrar was wrong in taking that subsequent misconduct into account combined with the previous misconduct (for so I hold it to be) of Mr. *Harper* in the arrangement with *Lovelock* and in the original appointment of a trustee. I think there was ground for the Registrar's order in the actual misconduct of Mr. *Harper*. But, as I have already said, I also agree with the Registrar as to the conduct of the trustee. In my opinion it would have been wise not to discuss the case a second time before the Registrar after it had been before us on the previous occasion, and it would have been wiser still not to have a second discussion before this Court, which can have only one possible result, viz., to add the censure of the Court to the dismissal of the appeal with costs.

LINDLEY, L.J.:—

The first thing we have to consider is upon what legal principles Mr. *Harper* ought to be paid his costs out of the estate. Mr. *Harper* is not, and never was the solicitor of the trustee who is asked to pay him his costs. He has not in fact been able to bring himself within those provisions of the *Solicitors Act* which would entitle him to a lien on a fund recovered or preserved by his exertions. He has no *locus standi* and no right to be paid out of the estate, except indirectly in this way, that he was the solicitor of the former trustee, Mr. *Sheard*. If whilst Mr. *Sheard* was trustee he had incurred any costs, charges, and expenses properly chargeable to the trust estate, any part of which would, as between him and his solicitor, be payable to the solicitor, the solic tor would be enabled to get paid out of the estate. Legally Mr. *Harper's* claim

C. A. 1882

Ex parte HARPER. *In re* POOLEY.

Lindley, L.J.

for payment is only against his own client who retained him, and he has no right to be paid out of any other fund, except on the principle which I have stated.

Now Mr. *Sheard* has been removed, and, if we look at the matter as between him on the one side and the estate on the other, I confess I do not see upon what principle it would be right to give him one farthing out of the estate. Instead of representing it for any beneficial purpose, he was, so far as I can see, appointed for the purpose of checkmating the creditors. If he were asking for the payment of his costs, charges, and expenses out of the estate, which of course means out of the money which would go to the creditors, the first thing he would have to shew is that he had acted properly towards those from whom he was seeking payment. Without going through the facts again, it appears to me that Mr. *Sheard* could not establish that proposition, and that he would be not only open to censure, but that his conduct was such as to compel any Court of Justice to deprive him of every sixpence. If so, on what principle does Mr. *Harper* expect payment out of the same fund? If he stands in no better position than Mr. *Sheard*, of course his claim, which is only circuitous, must fail like the more direct claim of his own client.

It would be sufficient for me to stop here if it were not that the Registrar has gone a little further, and in giving his decision has made use of some expressions to which I will call attention. He says, "The manner in which the creditors, I may admit on both sides, appear to have been manipulated for respective and antagonistic purposes would be amusing in a novel, but as a reality it appears to me shocking and most discreditable." So far as I can understand, and so far as I am capable of drawing any inference from the cross-examination of Mr. *Harper*, I entirely concur in that observation. I think the whole proceedings in this bankruptcy, on the one side and on the other, have been shocking and discreditable to every one concerned in them. I should not have said this if it had not been that, I confess to my surprise, Mr. *Harper* has challenged an expression of our opinion by saying that he does not see that he has done anything which deserves reprehension. It appears to me that he looks exclusively to the interests of his client. A solicitor who does that and who forgets

that other people have rights and interests, may go too far. A man must not sacrifice everything and everybody to the interest of his client, he is not bound to do all that his client tells him. It appears to me that Mr. *Harper* has gone lengths which, if he were indicted for conspiracy, might put him in a very awkward position. I say no more on this subject, we are not trying any case of that kind now; but that he has gone too far in his zeal for his client is to me painfully manifest. I think that the decision of the Registrar is quite right, and that the appeal must be dismissed with costs.

HOLKER, L.J.:—

I am of the same opinion. It appears to me very clear that it is a gross abuse of the bankruptcy law for persons to buy debts which are due by other people for no other purpose than that of enabling them to carry the choice of a trustee in bankruptcy, or to place anybody in a position of control with reference to the bankrupt's affairs. I cannot see that there is anything in that very different from the conduct of a man who buys up the right of another to exercise his franchise in voting for a member of Parliament or for a member of any other institution. It seems to me to come to the same thing and to be a piece of bribery. I regret to say that this does not appear to be the view of the public in general, for I believe it is the commonest thing in the world for people to buy the right of creditors to vote, and, having purchased that right, to exercise it in order to elect a trustee who shall be favourable to themselves or to a particular class of the creditors. But, although that is apparently the view of a portion of the public who have to do with bankruptcy, nevertheless there are many sins committed in the administration of bankruptcy, and it seems to me that if such conduct is investigated in a Court, the conclusion which the Court ought to arrive at is that such proceedings are not justifiable, but are really and truly a scandalous abuse of the law. Indeed that seems to have been practically decided in *Ex parte Griffin* (1), and it would, I think, be well for the community at large, at all events very advantageous to secure the moral dealings of people, that that decision should

(1) 12 Ch. D. 480.

C. A. 1882

Ex parte HARPER. *In re* POOLEY.

Holker, L.J.

be more generally known than apparently it is. But Mr. *Harper* not only attempted to aid those who were desirous of buying votes for the purpose of carrying the choice of trustee, but he went much further. When the second trustee had been selected, a gentleman who was likely to administer the estate properly, and to do everything which he ought to do for the benefit of the creditors at large, when he had been appointed trustee Mr. *Harper* conspired with another, he agreed (for that is the meaning of conspiracy) with the son of the bankrupt to buy up a debt due by the trustee, not for the purpose of forwarding the proceedings in bankruptcy, not for the benefit of the creditors at all, but for the purpose of making the trustee a bankrupt so that they might oust him from his position. They conspired together to do this for the purpose of obtaining an advantage for themselves, and not only for that, but with the object distinctly in their minds of injuring the trustee who had been appointed, and, though perhaps not the avowed purpose, yet with the probable result of injuring the creditors also.

It seems to me that it would not be straining the law at all to say that this was a conspiracy for which they might be indicted. Under these circumstances I think that the order of the Registrar should be affirmed.

Solicitors for Appellant: *Harper & Battcock.*
Solicitor for Trustee: *H. F. Barnett.*

W. L. C.

Ex parte M'GEORGE. *In re* STEVENS.

C. A.
1882
May 18.

Act of Bankruptcy—"Being a Trader"—"Departing from Dwelling-house or otherwise absenting himself"—Summary Adjudication—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 6, *sub-ss.* 3, 6—*Bankruptcy Rules*, 1870, *r.* 65.

The words "being a trader," in sub-sect. 3 of sect. 6 of the *Bankruptcy Act*, 1869, are to be construed in the same way as the same words in sub-sect. 6 of the section, and they mean in sub-sect. 3 that the debtor must be actually carrying on a trade at the time when he is alleged to have committed any of the acts therein mentioned as acts of bankruptcy if committed by a trader. It is not sufficient that he was carrying on a trade at the time when the petitioning creditor's debt was contracted.

A summary adjudication cannot be obtained under rule 65 unless the debtor was a trader at the time when he is alleged to have "departed from his dwelling-house or otherwise absented himself."

Ex parte Schomberg (1) approved and followed.

THIS was an appeal from a decision of Mr. Registrar *Pepys*, acting as Chief Judge in Bankruptcy.

W. H. Stevens carried on the business of a draper, and in the course of his trade he became indebted to *M. M'George* for goods supplied to him. *M'George* pressed him for payment, and *Stevens* made several appointments to see him about the debt, but failed to keep them. On the 17th of March, 1882, *Stevens* caused his book-debts and stock-in-trade to be put up for sale by auction, and a part of them was sold for £102 10*s.*, and the purchase-money was received by the auctioneer. A few days afterwards *Stevens* sold the remainder of his book-debts and stock-in-trade to his brother, who accepted bills of exchange for the purchase-money. In April, 1882, *M'George* endeavoured to serve *Stevens* with a debtor's summons, but he could not be found at his place of business. *M'George* made inquiries, and ascertained that *Stevens* had, on the 4th of April, received the £102 10*s.* from the auctioneer, and that he had, on the 19th of April, gone away to *India*, where he had obtained some appointment. *M'George* presented a bankruptcy petition against *Stevens*, alleging as an act of bankruptcy that he had "departed from his dwelling-house

(1) Law Rep. 10 Ch. 172.

C. A. 1882

Ex parte M'GEORGE. *In re* STEVENS.

or otherwise absented himself." An application was made to the Registrar, under rule 65 of the Bankruptcy Rules, 1870, for the immediate hearing of the petition on a sealed copy of it being left at the usual or last known place of residence or business of the debtor.

The Registrar refused the application, on the ground that sect. 6 (sub-sect. 3) and rule 65 apply only when the debtor is a trader at the time when the alleged act of bankruptcy is committed, and that *Stevens* had ceased to be a trader when he sold his business. *M'George* appealed *ex parte*.

Herbert Reed, for the Appellant:—

The Registrar held that the debtor had ceased to be a trader before he absconded, and that under sub-sect. 3 of sect. 6 of the *Bankruptcy Act*, 1869, it is essential that the debtor should be a trader at the time when he absconds (1). The Registrar relied on *Ex parte Schomberg* (2), but that was a decision on sub-sect. 6, and, moreover, there the debt was not a trade debt.

[JESSEL, M.R.:—I never heard of such a distinction. It was the debt of a trader.]

My debt was contracted during the debtor's trading. Under

(1) Sect. 6 provides that a bankruptcy petition may be presented against a debtor, alleging as the ground for adjudication "Any one or more of the following acts or defaults, hereinafter deemed to be and included under the expression 'acts of bankruptcy.'"

"(3.) That the debtor has, with intent to defeat or delay his creditors, done any of the following things, namely, departed out of *England*, or being out of *England* remained out of *England*; or being a trader departed from his dwelling-house or otherwise absented himself; or begun to keep house; or suffered himself to be outlawed."

"(6.) That the creditor presenting the petition has served in the prescribed manner on the debtor a debtor's summons requiring the debtor to pay a sum due, of an amount of not less than £50, and the debtor being a trader has for the space of seven days, or not being a trader has for the space of three weeks, succeeding the service of such summons, neglected to pay such sum, or to secure or compound for the same."

Rule 65 provides that "Where the act of bankruptcy alleged in a petition to have been committed by the debtor is that the debtor, being a trader, has departed from his dwelling-house or otherwise absented himself, the petition may be heard forthwith on a sealed copy of the petition being left at the usual or last known place of residence or business of the debtor."

(2) Law Rep. 10 Ch. 172.

the old Bankruptcy Acts it was often held that a debt contracted during the course of trading would support a commission of bankruptcy against the debtor though he had ceased to trade when the act of bankruptcy was committed. He is estopped from saying he is not a trader: *Ex parte Bamford* (1); *Bailie* v. *Grant* (2); *Ex parte Griffiths* (3).

[JESSEL, M.R.:—There is the decision in *Ex parte Schomberg* (4) on the meaning of the words "being a trader" in sub-sect. 6. Can we say that the words have a different meaning in sub-sect. 3?]

The object of the two sub-sections is different. The object of a debtor's summons is to force the debtor to commit an act of bankruptcy. It would be a monstrous result if a trader who desired to defeat his creditors could sell his business and go abroad, and they should have no remedy. The only way of reaching him in such a case is by proceeding under rule 65.

[JESSEL, M.R., referred to *Ex parte Bailey* (5)].

A man does not necessarily cease to be a trader because he sells his business.

JESSEL, M.R.:—

I am unable to see any distinction whatever between the words used in sub-sect. 3 and those used in sub-sect. 6 of sect. 6. [His Lordship read the two sub-sections.] The words are identical in the two sub-sections. If the words "being a trader" in sub-sect. 6 mean being a trader at the time when the debtor's summons is issued, the same words in sub-sect. 3 must mean being a trader at the time when the acts referred to are committed. What do the words mean? Their literal meaning is carrying on trade at the time when the act in question is committed. If there had been no prior statutes and no prior decisions, I do not suppose the point could have been decently argued. But, according to the decisions on the former bankruptcy statutes, a man was in law "using the trade of merchandize" so long as he did not pay the debts which

(1) 15 Ves. 449.
(2) 9 Bing. 121.
(3) 3 D. M. & G. 174.
(4) Law Rep. 10 Ch. 172.
(5) Law Rep. 13 Eq. 314.

C. A. 1882 *Ex parte* M'GEORGE. *In re* STEVENS. Jessel, M.R.

he had contracted while he was engaged in the trade. It is, however, to be observed that the words in the present Act are not the same as those in the former Acts, and though it is a well-settled rule that when there are two statutes *in pari materiâ*, and the later statute repeals the earlier one, but re-enacts some of its provisions in the same words, the decisions upon the words of the old statute apply to the new one, that rule applies with diminished force when the words in the new Act are changed. That being so, we have the decision of the Court of Appeal in Chancery in *Ex parte Schomberg* (1) on the very point. They decided that the words "being a trader" in sub-sect. 6 mean being a trader at the time when the debtor's summons is served, and not at the time when the debt was contracted. That decision appears to me entirely to govern the construction of the words "being a trader" in sub-sect. 3. Even if I were inclined to differ from the decision, I am bound by it.

LINDLEY, L.J.:—

I am of the same opinion. The question is, at what time must a man be a trader to bring him within the provisions of sub-sect. 3 or sub-sect. 6 of sect. 6? The very same question had to be considered in *Ex parte Schomberg*, and the Court there held that the words "being a trader" mean being a trader at the time when the summons is issued. In sub-sect. 3, in like manner, the same words must mean being a trader at the time when the acts referred to take place. The line being in each sub-section drawn between a trader and a non-trader, I think that *Ex parte Schomberg* is clearly in point, and it appears to me that it was rightly decided. The old cases were decided upon statutes containing different words, and at a time when a non-trader could not be made a bankrupt at all.

HOLKER, L.J.:—

I am of the same opinion.

Solicitors: *Haigh & Agar.*

(1) Law Rep. 10 Ch. 172.

W. L. C.

Ex parte LUXON. *In re* PIDSLEY.

C. A. 1882 May 18.

Appeal—Time—Payment of Deposit "at or before" entry of Appeal—Mistake of Officer of Court—Bankruptcy Rules, 1870, *r.* 145—*Bankruptcy Rules, November*, 1878, *r.* 2.

The practice laid down in *Ex parte Rosenthal* (1) that before entering an appeal in bankruptcy the Registrar ought now to give a direction to the *Bank of England* to receive the deposit payable on the entry, and not to enter the appeal until he receives from the Bank a certificate that the money has been paid, applies to appeals from the Chief Judge to the Court of Appeal, as well as to appeals from a County Court to the Chief Judge.

A notice of appeal from an order made by the Chief Judge on the 24th of April was taken to the office of the Registrar of Appeals on the 28th of April. The Registrar's clerk entered the appeal, and gave a direction to the Bank to receive the deposit. The money was paid to the Bank on the 8th of May. The certificate of the Bank of the payment was then taken to the Registrar's office, but the clerk made no further entry of the appeal:—

Held, that the clerk had made a mistake in entering the appeal before receiving the Bank's certificate of the payment of the deposit, but that as there had been no default on the part of the Appellant the appeal could be entertained.

THIS was an appeal from a decision of *Bacon*, C.J.

The order appealed from was made on the 20th of March, 1882, but was not signed till the 24th of April. A notice of appeal dated the 28th of April was taken on that day to the office of the Registrar of Appeals, and was entered by the Registrar's clerk in the proper book. He gave a direction to the *Bank of England* to receive the deposit payable on entering the appeal, and the deposit was paid to the *Bank of England* on the 8th of May. The Bank's certificate of the payment was afterwards taken to the Registrar's office, but no further entry of the appeal was made.

Winslow, Q.C., and *De Colyar*, for the Appellant.

Cooper Willis, Q.C., and *Yate Lee*, for the Respondent, objected that the deposit had been paid too late, and that the appeal could not therefore be entertained. The deposit ought to have been paid "at or before" the entry of the appeal: Bankruptcy Rules, 1870, r. 145; Bankruptcy Rules, November, 1878, r. 2; *Ex parte*

(1) *Ante*, p. 315.

C. A. 1882 *Ex parte* LUXON. *In re* PIDSLEY.

Rosenthal (1). Rule 145 still applies to appeals to this Court as well as to appeals from County Courts to the Chief Judge: *Ex parte Isaacs* (2).

Winslow, Q.C., and *De Colyar*, for the Appellant:—

The deposit was paid within the twenty-one days limited for appealing. In this respect the case differs from *Ex parte Rosenthal.*

[JESSEL, M.R., inquired of the Registrar's clerk, who was in Court, what the practice in the office was, and then said: The Registrar's clerk says that when the appeal is to this Court it is entered at once when the appeal notice is brought to the officer. There is no subsequent entry after the deposit has been paid to the Bank.]

That is contrary to the rule laid down by this Court in *Ex parte Rosenthal* that the appeal should not now be entered till after the certificate of the Bank that the deposit has been paid is brought to the Registrar. If there has been a miscarriage it is the fault of the officer of the Court; the Appellant is not to blame.

JESSEL, M.R.:—

The mistake has been made by the officer of the Court. He ought to pursue the same course with regard to appeals to this Court as with regard to appeals to the Chief Judge. The mistake cannot occur again. We will hear the appeal.

LINDLEY and HOLKER, L.JJ., concurred.

The appeal was then heard on its merits, and was dismissed.

Solicitor for Appellant: *W. Bohm*, agent for *Cleverton & Son, Plymouth.*

Solicitor for Respondent: *W. Moon*, agent for *A. F. Luke, Exeter.*

(1) *Ante*, p. 315. (2) 9 Ch. D. 271.

W. L. C.

Ex parte IZARD. *In re* MOIR.

C. A.
1882
May 18.

Liquidation Resolutions—Refusal of Registration—Power of Court to order Return of Stamp Duty paid on filing of Resolutions—Order of 1st January, 1870, as to Fees—Ex parte Appeal—Service on Registrar—Appearance by Counsel—Costs.

When the registration of liquidation resolutions is refused, the Court has no power to order repayment of the *ad valorem* duty paid on the presentation of the resolutions for registration.

The only mode of obtaining a return of the duty is by a memorial to the Commissioners of Inland Revenue.

Notice of an appeal from a Registrar acting as Chief Judge ought not (even if it is *ex parte*) to be addressed to or served on the Registrar.

Notice of an *ex parte* appeal was addressed to and served on the Registrar, and he appeared by counsel on the hearing:—

Held, that the Appellant ought not to be ordered to pay the Registrar's costs.

THIS was an appeal from a decision of Mr. Registrar *Hazlitt*, acting as Chief Judge in Bankruptcy.

In November, 1881, *A. M. Moir* filed a liquidation petition, and at the first meeting of his creditors under the petition, on the 9th of December, resolutions were passed that his affairs should be liquidated by arrangement; appointing *W. Izard* trustee; and intrusting the registration of the resolutions to him. On the 12th of December, 1881, *Izard's* solicitor carried in the resolutions for registration, and they were filed in the Registrar's office. Before filing them it was necessary to affix stamps to the value of £52 15*s.*, the amount of the *ad valorem* duty payable, under the Order as to fees of the 1st of January, 1870, upon the filing. The £52 15*s.* was paid by *Izard* out of his own moneys, and the stamps were affixed to the resolutions and cancelled by the Registrar's clerk. The registration of the resolutions was opposed by a dissentient creditor, who objected to the proofs of some of the creditors who had voted at the meeting. The Registrar struck out some of the proofs, and then refused to register the resolutions, on the ground that they had not been passed by the proper statutory majority. *Izard* afterwards applied to the Registrar for an order that the £52 15*s.* paid by him for *ad valorem*

C. A. 1882 *Ex parte* IZARD. *In re* MOIR.

duty might be returned to him, or that fresh stamps for the amount thereof might be issued to him. The Registrar refused the application.

Izard appealed.

The notice of appeal was addressed to the Registrar only, and was served upon him.

F. Cooper Willis, for the Appellant:—

[JESSEL, M.R.:—Have we any power to make such an order? Formerly there was a Bankruptcy Fee Fund, but there is no such fund now.]

The late Mr. Registrar *Keene* frequently, in cases where the registration of liquidation resolutions was refused, gave a direction that the stamp duty which had been paid on their being filed should be returned, and the Inland Revenue officers used to act on his direction and repay the money. There will be no difficulty in getting the money back if the Court gives a certificate. The rule of the 1st of January, 1870, as to fees requires that the duty shall be paid on the special resolution being presented to the Registrar for registration. In this case the resolutions were not properly passed, and were therefore not special resolutions at all, and no duty was payable.

[JESSEL, M.R.:—Then you paid in your own wrong.]

Crump, for the Registrar, was not heard.

JESSEL, M.R.:—

The Court of Bankruptcy has no more power to make such an order than the High Court has. You must memorialize the Commissioners of Inland Revenue. We have no power in the matter.

LINDLEY and HOLKER, L.JJ., concurred.

Willis:—The deposit should be returned to us. The Registrar ought not to have appeared.

[JESSEL, M.R.:—You ought not to have served him.]

We were told by the Registrar's clerk that we must serve the

C. A. 1882 *Ex parte* IZARD. *In re* MOIR.

Registrar. But he need not have appeared. We ask no relief against him. Rule 144 requires that a copy of the appeal notice shall be sent to the Registrar.

JESSEL, M.R.:—

There will be no order as to the costs. It must be understood for the future that notices of *ex parte* appeals are not to be addressed to the Registrar. Appeals which are not *ex parte* never are addressed to him.

LINDLEY and HOLKER, L.JJ., concurred.

Solicitors for Appellant: *May, Sykes, & Batten.*
Solicitor for Registrar: *W. W. Aldridge.*

W. L. C.

MAY *v.* THOMSON.

C. A. 1882 V.-C. B. *Feb.* 9, 10, 11. C. A. *May* 16, 18.

[1881 M. 1792.]

Specific Performance—Sale of Medical Practice—Stipulation for Personal Introduction—Agreement by Letter—Reference to formal Contract—Statute of Frauds.

The Plaintiff wishing to sell a medical practice with the lease of the house where it was carried on, placed it on the books of a medical agent. This led to negotiations with the Defendant. The premiums asked for the practice and for the lease were stated in a letter from the agent to the Defendant, but no time for completing the purchase was mentioned. The Defendant replied in a letter to the agent accepting the terms offered, and adding that he should be ready to pay the deposit money "on receipt of corrected agreement," and at the same time he wrote to the Plaintiff personally, also accepting the terms offered and adding, "I shall trust to you to give me the best introduction you can during three months and afterwards, if necessary." The Plaintiff replied, thanking the Defendant for acceding to his terms and saying that "it would be his aim as well as his duty to give him an effectual introduction to his patients." A formal agreement was drawn up but never signed, and after some further correspondence the Defendant refused to complete the purchase:—

Held (affirming the decision of *Bacon*, V.C.), that inasmuch as the time for the commencement of the purchase was left uncertain, and the stipulation as to the three months' introduction was not agreed to, and as the parties

C. A.
1882
MAY
v.
THOMSON.

contemplated a formal agreement, there was no binding contract between the parties, and the action was dismissed.

Whether the Court can enforce specific performance of a contract to sell a medical practice—*Quære.*

THIS was an action for specific performance of an agreement by the Defendant, alleged to have been contained in certain letters, for the purchase of the Plaintiff's medical practice, lease of house and furniture; and for additional or substitutional relief in damages for breach by the Defendant of the agreement.

The Plaintiff was a consulting family physician living at 103, *Earl's Court Road, Kensington,* of which house he was lessee for twenty-one years from the 29th of September, 1874, and in March, 1881, was anxious from the state of his health to sell his practice and to retire from the profession. About the same time the Defendant who had been in practice as a doctor of medicine at *Peterborough,* and sold his practice in 1880, desired to obtain another in or near *London,* and with that view applied to Mrs. *Needes,* who was an agent for the sale and disposal of medical practices. On the 5th of April, 1881, Mrs. *Needes* wrote to Plaintiff, whose advertisement in the *Lancet* she had seen, offering to introduce the Defendant to him as a probable purchaser, and on the following day, the 6th of April, 1881, wrote to Defendant as follows: "I have just had a first class non-dispensing practice in the best part of *Kensington* placed with me to be disposed of in consequence of failing health. The patients are chiefly the upper class . . . The practice is steadily increasing, and last year realised £540 cash. No horse necessary. Handsome corner residence, fitted with every modern convenience. Rent on lease, fourteen years to run, £130. Contains seven bedrooms, &c. Premium for practice £1000, for lease £500, and furniture at valuation. You could if desired see the vendor here by appointment any day between four and five o'clock."

On receiving this letter the Defendant came to *London,* and on the 8th of April met the Plaintiff by appointment at the office of Mrs. *Needes,* and next day called and went over the Plaintiff's house at *Earl's Court Road.* On the 12th of April the Defendant, accompanied by his wife, again visited the house. The Plaintiff then informed the Defendant that he did not intend

doing anything whatever in the way of papering or painting, or otherwise in repairing the premises, and also told him that a purchaser must take all the furniture at a valuation.

On the 13th of April, 1881, the Defendant wrote from *Peterborough* to the Plaintiff as follows: "I beg to inform you that I shall be pleased to purchase your lease, &c., &c., on the terms stated in Mrs. *Needes*' letter to me of the 6th of April, *i.e.*, premium for practice £1000; lease £500; furniture at valuation. I shall trust to you to give me the best introduction you can during the three months and afterwards if necessary." In a letter of the same day the Defendant wrote to Mrs. *Needes*, informing her that he agreed to the purchase of Dr. *May's* practice, lease and furniture on the terms stated in her letter of the 6th of April, "and I shall be ready to pay the deposit money on receipt of corrected agreement. Mr. *Thomas Hawkins*, of 32, *Ludgate Hill*, will act as my agent." Mrs. *Needes* on receiving this letter wrote to the Plaintiff informing him of it, but did not specify its contents.

On the 15th of April, the Plaintiff wrote to Defendant: "I now write to thank you for acceding to my terms, and in return it will be my aim as well as duty to give you an effectual introduction to all the patients on my list, and I am thankful that in introducing you I shall be able to speak (at convenient seasons) of you in such terms as will secure their confidence and goodwill towards you as well as myself. With the advantages you possess and in such a neighbourhood as this, a growing and improving one, the £550 income will in all probability be doubled in two or three years, and with very little labour. Mrs. *Needes* has written to request a call in order that she may enter all necessary particulars for the drawing out of our agreement. I will appoint next Tuesday. Before that day I should like a few lines from you stating that you take the house from the Midsummer quarter, and if you would like to take to the practice from the same date."

In a letter of the 18th of April, Defendant's wife wrote to Plaintiff's wife that as her husband was very busy "he desires me to state in reply that we will be glad to take the house from Midsummer, and the practice from the 1st of July." July was afterwards altered to June, but by that time a new dispute had arisen founded on the Defendant's claim to a payment for repairs.

C. A. 1882 MAY v. THOMSON.

On the 22nd of April Mrs. *Needes* sent Plaintiff a draft agreement, "which I think embodies the arrangement mutually arrived at," requesting him to return it after perusal so that it might be forwarded to Defendant. This draft agreement included a stipulation that the Plaintiff should introduce the patients to the Defendant for three months from the 1st of June. Next day Plaintiff wrote calling Mrs. *Needes'* attention to the fact that he was to do nothing whatever to the house in the way of painting, &c., "and this is thoroughly understood by Dr. *Thomson*," and accordingly that one of the clauses in the draft agreement must be omitted.

On the 29th of April Defendant and his wife again went by appointment to the Plaintiff's house and, it was alleged in his statement of defence, that he then discovered for the first time on this visit that the practice was rapidly diminishing, and also that the premises were in a very bad state of repair.

Some correspondence followed on the question of painting, papering, and repairs, and on the 3rd of May the Plaintiff, through Mrs. *Needes*, offered the Defendant £25 towards necessary repairs. This offer, in order, as Plaintiff alleged, to prevent any unpleasant feeling and to avoid any delay in carrying out the agreement, was increased to £50, the Plaintiff insisting throughout that it never had been agreed that he should pay anything towards repairs.

On the 5th of May, Mrs. *Needes* sent the lease of Plaintiff's house to the Defendant's agent *Hawkins*.

On the 10th of May the Defendant's agent, *Hawkins*, in a letter to Mrs. *Needes*, stated that he could not advise the Defendant to accept the £50, feeling confident that it was very much below the necessary sum, and suggested that it might be better for the Defendant to "withdraw from the negotiation altogether rather than make the repairs a matter of dispute, it being evident that Dr. *May's* valuation and the requirements of the lease are widely different." After some further correspondence the Defendant, about the 12th of May, gave notice that he declined to proceed any further, and withdrew from the contemplated purchase, offering to pay any expenses incurred by the Plaintiff in the negotiations. The Plaintiff declined to release the Defendant except on receiving compensation *ultra* mere expenses.

In these circumstances the Plaintiff had brought this action.

The Defendant by his statement of defence raised the case that the Plaintiff's lease, by breach of the lessee's covenants to paint, paper, and keep the premises in repair, was valueless in March, 1881, and that the existence of such covenants was for the first time discovered when the lease was sent to the Defendant's agent *Hawkins*, in May, 1881; that he had been induced to enter into the negotiation by the Plaintiff's untrue representations as to the value of the practice, which in fact was rapidly decreasing, and that the premises, which his wife had not the opportunity of thoroughly examining, were in a very bad state of repair. All these allegations were disproved by the evidence, the Defendant admitting in cross-examination that there was no foundation for them. Defendant also denied that any concluded agreement was ever come to between the Plaintiff and himself as to the proposed purchase: Mrs. *Needes*' letter of the 6th of April, as agent of the Defendant and not of the Plaintiff, and the Defendant's letter of the 13th of April, being merely offers with a view to negotiations, the terms of the proposed purchase being left open to be agreed upon, and that it was never intended on either side that there should be any binding agreement until the formal contract (which is customary in the sale of medical practices) should have been settled and executed. He also relied on the *Statute of Frauds*.

The action came on to be heard before Vice-Chancellor *Bacon*, on the 9th of February, 1882.

Hemming, Q.C., and *Crawfurd Munro*, for the Plaintiff.

Marten, Q.C., and *A. Young*, for the Defendant:—

We rely upon the *Statute of Frauds*, and submit that there never was any complete and concluded agreement between the parties of which specific performance can be directed. Even assuming that the letters of the 6th and 13th of April, taken by themselves, would have been evidence of a concluded contract sufficient to satisfy the *Statute of Frauds*, those letters cannot be taken alone, but the whole of what took place and passed between the parties must be taken into consideration: *Hussey* v. *Horne*

C. A. 1882 MAY v.

Payne (1). But those letters did not, *per se*, amount to a contract within the *Statute of Frauds*. The letter of the 13th of April did not contain an unqualified acceptance of Mrs. *Needes*' letter of the 6th of April, which only gave the leading features of the terms stipulated for by the vendor, but introduced a new term as to personal introduction to be given by the Plaintiff. All that those letters amounted to was negotiation pointing to the subsequent preparation of a formal contract; and that is not sufficient upon the authorities to constitute a binding agreement: *Ridgway* v. *Wharton* (2); *Rummens* v. *Robins* (3); *Winn* v. *Bull* (4). Assuming that the letters constitute a contract, it is one which cannot be enforced for want of certainty. No time is named for the completion of the purchase and entering upon the business by the Defendant: *Marshall* v. *Berridge* (5). The price of the furniture is not fixed, but is left to be ascertained by a valuation: *Milnes* v. *Gery* (6); *Darbey* v. *Whitaker* (7); *Tillett* v. *Charing Cross Bridge Company* (8). Then it is an essential part of the agreement contained in the letter of the 13th of April, on which the Plaintiff relies, that the Plaintiff shall personally introduce the Defendant to his patients, and as this part, which involves personal service and therefore cannot be enforced: *Johnson* v. *Shrewsbury and Birmingham Railway Company* (9), is not independent and cannot be separated from the agreement to purchase, the Court, being unable to carry into effect the whole agreement, cannot direct specific performance: *Ogden* v. *Fossick* (10). The agreement is also bad for want of mutuality. Mrs. *Needes* was not the Plaintiff's agent, and her letter of the 6th of April could not have been enforced by the Defendant. On the question of damages, the Plaintiff is not entitled to recover if he fails to obtain specific performance, as he has not complied with the terms of his lease and was not in a position to hand over the house in a proper state of repair, and might have exposed the Defendant, if the purchase had been carried out, to the risk of a forfeiture.

(1) 4 App. Cas. 311.
(2) 6 H. L. C. 238.
(3) 3 D. J. & S. 88.
(4) 7 Ch. D. 29.
(5) 19 Ch. D. 233.
(6) 14 Ves. 400.
(7) 4 Drew. 134.
(8) 26 Beav. 419.
(9) 3 D. M. & G. 914.
(10) 4 D. F. & J. 426.

Hemming, in reply:—

Where, as in this case, the letters contain a clear offer and a clear acceptance, the fact that a formal contract embodying the conditions was contemplated but not executed, does not render the informal contract invalid or incapable of being specifically performed: *Rossiter* v. *Miller* (1), which disposes of the argument founded on *Ridgway* v. *Wharton* (2). The cases cited on the other side as to the impossibility of enforcing a contract when the price was left to be ascertained by arbitration, were all cases in which the questions had to be referred to individual arbitrators whom the Court could not compel to make an award. Contracts for the sale of a professional business (which invariably provide for this sort of personal recommendation by the vendor to his patients or clients) are constantly enforced, and the insertion of such a condition is not any bar to specific performance: *Candler* v. *Candler* (3); *Aubin* v. *Holt* (4); *Whittaker* v. *Howe* (5). In any case we ask for and are entitled to relief in damages.

BACON, V.C.:—

This is a most unsatisfactory case, but nothing can be clearer or more plain taking it up at its origin. It is with reference to a contract between two men upon a subject with which they are perfectly well acquainted, both being medical practitioners, and both not unacquainted with the manner in which medical practices are sold and bought in the market, if there is a market for such things. They come together for the purpose of the Defendant dealing with the Plaintiff and purchasing his house and practice. All that there is in writing about it consists, first, of Mrs. *Needes*' letter; and it is not pretended that Mrs. *Needes* was the agent for the Plaintiff to negotiate with anybody for the purchase. Mrs. *Needes* writes a letter of the 6th of April, 1881, in which she states the general terms or general particulars of what is to be sold and at what price it is to be sold. Then, after an interview between the Plaintiff and Defendant, follows the letter of the 13th of April from the Defendant to the Plaintiff.

(1) 3 App. Cas. 1124.
(2) 6 H. L. C. 238.
(3) Jac. 225.
(4) 2 K. & J. 66.
(5) 3 Beav. 383.

C. A.
1882
MAY
v.
THOMSON.
V.-C. B.

And that is all that exists in the shape of a contract between the parties. But the meaning of it is obvious. Between two men of reputation who had any regard to their own pledged words, that was as good an agreement as could be made. But unfortunately it is an agreement of which the Court cannot compel specific performance, not only because of the *Statute of Frauds*, but also because of the circumstances which happened after the letter was written. That the letter was written with full knowledge of the subject by the Defendant, and after an examination of the house and an inspection of it by his wife and his mother-in-law, and after an examination of the Plaintiff's books to satisfy himself of the accuracy of the representations which had been made to him by the Plaintiff as to the annual income of the practice, there is no doubt. There is no doubt that the Defendant in all honesty and in all honour is bound by his letter of the 13th of April to complete the contract which he obviously intended to enter into by that letter. But when that letter comes to be examined it is plain that no time was mentioned for the completion of the purchase, though that probably would not be an insuperable difficulty; then there is an item that the furniture is to be taken at a valuation. What furniture? There is no inventory; it is not even mentioned as the furniture in the house; there is no accurate statement of the subject-matter which is being contracted for. Then there is the further stipulation which is not to be found in Mrs. *Needes'* letter, and which must therefore have been the subject of some verbal arrangement between the parties; viz. that stipulation as to personal introduction, which is entirely new. How could the Court direct specific performance of that stipulation? I bear in mind the evidence which has been given to me, and which I readily receive as a fact, that when medical men sell their practices, the introduction being a principal feature in it, there must be stipulations which ensure the performance of the services attending the introduction by the vendor. As a matter of law I cannot tell what this introduction means, though as a matter of fact I do not affect not to know it perfectly well. There must be some arrangement between them in writing which they can understand and which Judges and juries can understand, if the question ever arises as to what was the meaning of the

parties. But the agreement is wholly vague and unmeaning in that respect. It was intended that that defect should be cured by a subsequent stipulation in some subsequent transaction, and Mrs. *Needes*, who is well versed in this kind of business, and the other agent both say that it is usual on these occasions to have these stipulations in writing. There was to be some obligation on the part of the Plaintiff, who was perfectly well aware of the vagueness of the expression, "I shall trust to you to give me an introduction for three months." But from what time I cannot tell, or of what nature except so far as I can read the words themselves. Afterwards a draft was prepared in which were stipulations for all that was required to express what was meant by the introduction during the three months, but that draft never was adopted. Without going into all the rest that has been said I am stopped at once by the impossibility of this Court decreeing specific performance of such an agreement if it is only contained in that letter of the 13th of April, by reference to the letter of Mrs. *Needes* which does not contain it all. I do not know how I could enforce it by the decree I am asked for. But when the *Statute of Frauds* is involved I see at once that there is a plain answer to the case. I cannot charge the Defendant with that which the Plaintiff seeks to charge him with, for I find no note or memorandum in writing sufficient to justify me in doing so; and upon that ground, and upon the other grounds which I have mentioned, I cannot decree specific performance of this contract. That it ought in all honesty to be performed I do not hesitate to say; but that I cannot make the decree I am satisfied as a matter of law, and the action must therefore be dismissed. But when I come to consider the question of costs, and the terms on which the action should be dismissed, it is not possible for me to follow the general rule in this case. Although in general the result of a case governs the costs, it is impossible that I can give the Defendant any costs in this action. He has by subterfuges and afterthoughts raised what is called a defence, which I think quite unworthy of the Defendant in such a case. I allude to the quibble about the covenants in the lease, the difficulty about making the valuation, and so on. These are all I say subterfuges here, although the Defendant might have the right to rely on

C. A. 1882 MAY v. THOMSON. V.-C. B.

them at law. [His Lordship, after commenting upon the very offensive charges of fraud against the Plaintiff contained in the statement of defence and to some extent, though not with a very good grace, retracted, or at all events not persisted in, said:—] All I can do with this most uncomfortable and unsatisfactory case is to say that the law compels me to dismiss the action, but that at the same time the circumstances require me and the law empowers me to say that in all justice and honesty it must be dismissed without costs.

F. G. A. W.

C. A.

From this decision the Plaintiff appealed. The appeal came on to be heard on the 16th of May, 1882.

Hemming, Q.C., and *Crawford Munro*, for the Appellant:—

The Defendant set up a case of misrepresentation, which, when put into the witness-box, he abandoned. Only two points are left, whether the letters created a contract, and, if so, whether it is one which the Court can enforce. The judgment gives no sufficient reason why the Plaintiff should not at all events have damages. One argument on the part of the Defendant was that the last of the three letters contained a reference to a proposed formal agreement, and that, therefore, there was no concluded contract; but *Rossiter* v. *Miller* (1) and *Bonnewell* v. *Jenkins* (2) dispose of that. Then it was said that the second letter introduced a new term, to which the Plaintiff did not accede. We say it was not a new term, and that if it was it was distinctly acceded to by the letter of the 15th. Then an objection was taken as to the valuation, but it is untenable. It is every-day practice to enforce contracts containing conditions that timber or furniture shall be taken at a valuation: *Richardson* v. *Smith* (3); *Smith* v. *Peters* (4). The Vice-Chancellor misunderstood *Marshall* v. *Berridge* (5). That related to an agreement to grant a lease, and there the time of commencement must be defined in order to ascertain the subject-matter; but it is not necessary in a con-

(1) 3 App. Cas. 1124.
(2) 8 Ch. D. 70.
(3) Law Rep. 5 Ch. 648.
(4) Law Rep. 20 Eq. 511.
(5) 19 Ch. D. 233.

tract for sale of an existing lease to define the time when the sale is to be completed. When no time is stated the law implies a reasonable time: *Dart*, Vendors and Purchasers (1); *Carrodus* v. *Sharp* (2).

[JESSEL, M.R.:—I cannot see my way to making a decree for specific performance of an agreement to purchase a medical practice. What can the Court order the seller to do?]

In *Fry*'s Specific Performance (3) it is laid down that there can be specific performance, and *Bunn* v. *Guy* (4) and *Whittaker* v. *Howe* (5) are referred to. At all events, if the contract is proved, the Plaintiff is entitled to damages.

Marten, Q.C., and *A. Young*, for the Defendant:—

The Plaintiff declined an offer of compensation for the expenses he had been put to, and he can get nothing more: *Bain* v. *Fothergill* (6). As to anything beyond expenses the Plaintiff can recover nothing. He has suffered no special damage. But we say that there was no contract within the *Statute of Frauds*. The Plaintiff himself admits that it is the recognised custom in sales of medical practices to have formal agreements, and this must be imputed. There was to be no agreement till a formal contract was signed: *Winn* v. *Bull* (7). Then there is a term as to the sale of furniture, not saying what furniture and not referring to an inventory. It was left to be settled by subsequent negotiations.

[JESSEL, M.R.:—A man offers to sell his house and furniture: do you mean to say that it is uncertain what furniture is meant?]

The statement of claim alleges Mrs. *Needes*' letter and that of the Defendant as constituting a contract, but Mrs. *Needes* was not an agent for sale, and had no power to enter into a contract. The Plaintiff does not assent to the term of a three months' introduction; he only says "an effectual introduction," which is a different matter. Though two letters taken alone may appear to make a contract, the whole correspondence may shew that they do not make one: *Hussey* v. *Horne-Payne* (8). The parties from

(1) Page 629.
(2) 20 Beav. 56.
(3) 2nd Ed. p. 34
(4) 4 East, 190.
(5) 3 Beav. 383.
(6) Law Rep. 7 H. L. 158.
(7) 7 Ch. D. 29.
(8) 8 Ch. D. 670; 4 App. Cas. 311.

C. A. 1882 MAY v. THOMSON.

the beginning intended to have a formal agreement. They were never agreed upon the terms of the sale of the business. The time at which the transaction was to be completed was never settled, and the term which the Defendant wished to insert as to the three months' introduction to the patients was never consented to by the Plaintiff. Such a stipulation is most important in sales of this nature; without it the assignment of the goodwill would be nugatory.

Hemming, in reply.

JESSEL, M.R.:—

This is an appeal from a decision of Vice-Chancellor *Bacon*, who simply decided that there was no case made for specific performance, and, as I understand, that the matter never reached the position of contract at all, but was negotiation only.

The alleged agreement consists of a series of letters, and I entirely agree with the view which has always been taken of these matters, and which is emphasized by the recent decision of the House of Lords in the case of *Hussey* v. *Horne-Payne* (1). That case is a very good illustration of the difference of opinion which we find sometimes occurs between Judges as to the meaning of letters. Vice-Chancellor *Malins* came to one conclusion as to the meaning of some of the letters, and held that there was a concluded agreement; then the Appeal Court were unanimously of opinion that a clause in one of the letters was a condition precedent, and the House of Lords was of opinion it was not a condition precedent, but that there was no concluded agreement.

In the first place, I will make this general observation. I think the decisions of our Courts as to letters have gone quite far enough, that is, in the spelling out of a contract from letters when both parties intended a formal contract to be executed. I think it very often happens that both parties use expressions in letters which, read alone, would amount to a contract if we did not know that in fact neither of the parties intended those general expressions to constitute a contract, and in that case, if the Court lays hold of the language of the letters to make a contract, it

(1) 8 Ch. D. 670; 4 App. Cas. 311.

makes a contract for the parties which the parties never intended to enter into. If, for instance, both parties intend that a lease should be taken from a day to be named, and the one simply said that he would take a lease, and the other said he would grant a lease, and it was held that that was enough without fixing a day, you would be making a new bargain for the parties.

Well, now turn the granting of a lease into an assignment, the same intention may be present to them. It may be an assignment of a lease and goodwill of a business. Both parties may thoroughly understand that they are to have a day fixed for the payment of the purchase-money and the carrying out of the assignment, and that there is to be no final bargain without it; yet if they do not state it, the Court, it is said, fixes upon the term and makes them bargain for a reasonable time, to be fixed upon by a jury, who may be, perhaps, not very conversant with the matter. We must always be on our guard against that.

Now the main subject of the sale in this case was a medical practice belonging to the Plaintiff, Dr. *May*, which was proposed to be purchased by the Defendant, Dr. *Thomson*. The proposed sale began by a statement made by a Mrs. *Needes*, who seems to have been an agent for the disposal of medical practices, offering the Plaintiff to introduce to him a customer, she having heard that he wished to dispose of his practice, and then she wrote to Dr. *Thomson* on the 6th of April this letter: "Dear Sir,—I have just had a first class non-dispensing practice in the best part of *Kensington* placed with me to be disposed of in consequence of failing health." Then the practice is described, and it is stated that there is a handsome residence; then the terms of the lease are mentioned, and that "the premium for the practice is £1000, for the lease £500, and furniture at valuation." Well, that is the beginning of it.

Then the Defendant, Dr. *Thomson*, agrees to buy by a letter which is written to Mrs. *Needes*, and by a letter also to Dr. *May*—he writes the two letters on the same day. Their terms are not exactly identical, but they must both be read to see what it was he agreed to. On the 13th of April he writes to Mrs. *Needes* this letter: "I beg to inform you that I have agreed to the purchase of Dr. *May's* practice, lease, and furniture, in the terms stated in

C. A. 1882 MAY v. THOMSON. Jessel, M.R.

your letter of the 6th of April, and I shall be ready to pay the deposit-money on receipt of corrected agreement." That is what he writes to her. He does not mention the corrected agreement in the other letter. Then he names an agent, a Mr. *Thomas Hawkins*. Then to Dr. *May* he writes a letter on the same day: "I beg to inform you that I shall be pleased to purchase your lease, &c., on the terms stated in Mrs. *Needes*' letter to me of the 6th of April; namely, premium for practice, £1000, lease £500, and furniture at valuation. I shall trust to you to give me the best introduction you can during the three months, and afterwards if necessary."

Now it is quite plain those two letters do not contain exactly the same terms; one says that he is ready to pay the deposit on receipt of the corrected agreement, which, of course, makes the whole thing conditional on the getting one, the other leaves out that condition, and introduces the condition about the introduction. I pause there to consider what there was to sell. The main subject of the sale was, as I have said, a medical practice, the lease and furniture were only an adjunct of the practice. What is the meaning of selling a medical practice? It is the selling of the introduction of the patients of the doctor who sells to the doctor who buys, he has nothing else to sell except the introduction. He can persuade his patients, probably, who have confidence in him to employ the gentleman he introduces as being a qualified man, and fit to undertake the cure of their maladies, but that is all he can do. Therefore, when you talk of the sale of a non-dispensing medical practice—of course, when a man keeps what is called a doctor's shop there is a different thing entirely to sell—you are really talking of the sale of the introduction to the patients, and the length, the character and duration of the introduction, the terms of the introduction, are everything. And there is something more, according to my experience, in cases of the sale of medical practices—I do not know how the evidence is with regard to it in this case—there is always a stipulation that the selling doctor shall retire from practice either altogether or within a given distance. It is so always, and there is also sometimes a stipulation that he shall not solicit the patients, or shall not solicit them for a given time. They are

both very important stipulations as regards keeping together the practice for the purchasing doctor.

Well, when you do not find any of those things stipulated for, can you suppose that Dr. *Thomson* intended to buy without something being stipulated for as to what he was to buy—the length of the introduction, the retirement from business of Dr. *May*, or something? It is impossible. He must have intended some other stipulation to be put in, and you find, in fact, that that is really assented to on the part of the Plaintiff.

Now, then, we have to see whether Dr. *May* accepted the terms of either of those two letters. He did not accept the terms of the letter to Mrs. *Needes* which refers to the agreement, because it was not sent to him. But did he accept the terms mentioned in the letter sent on the 13th of April to himself? He begins by explaining the delay in answering the previous letter. This is dated the 15th of April: "I now write to thank you for acceding to my terms, and in return it will be my aim as well as duty to give you an effectual introduction to all the patients on my list, and I am thankful that in introducing you I shall be able to speak (at convenient seasons) of you in such terms as will secure their confidence and goodwill towards you as well as myself." Then he says: "Mrs. *Needes* has written to request a call in order that she may enter all necessary particulars for the drawing out of our agreement. I will appoint next Tuesday. Before that day I should like a few lines from you stating that you take the house from the Midsummer quarter, and if you would like to take to the practice from the same date." So that here is a new term introduced.

I will examine both those points separately: First, did he assent to the terms proposed by Dr. *Thomson* with regard to an introduction for the three months? Those terms are very indefinite, but it was to be a term clearly for some three months' introduction, although it is called "the three months." There was certainly a stipulation for a three months' introduction, wherever it was to begin from. But Dr. *May* does not bargain to give him a three months' introduction. What he says is: "It will be my aim as well as duty to give you an effectual introduction;" but he never assents to that term, and the difference is

C. A. 1882 MAY v. THOMSON. Jessel, M.R.

very important. The practice was professed to be sold because Dr. *May* was in failing health; that was the first statement of Mrs. *Needes*: so that there was the risk that he might not survive to perfect the introduction; and with regard to the stipulation for a three months' introduction, therefore it might become for that reason very important that he should not bind himself. And so I read the letters; he never assented to that, he only offered something which he did not say he would bargain to do, but he said that it would be his aim and duty—that he would do his best; and, therefore, as I read his letter of the 15th of April, it is nothing more than an offer that he would use his best endeavours to ensure Dr. *Thomson* an introduction to the patients; and, of course, if he did fail in health or die, or if he was incapacitated in any way from doing that, there would be no action for damages upon his letter. I cannot find any term in his letter accepting that stipulation. Nor is there any term stating the time from which the purchase should begin. That is a very important point, especially where the vendor is in failing health, but that is never assented to; there is negotiation about it, and different periods are named, but the exact time is never fixed.

Well then, that being so, I do not think that in these letters there is a complete and concluded bargain between the parties, the material thing being an introduction, and the condition being that there shall be a three months' introduction given.

Now I turn to the draft agreement, which was sent soon after the letter which Mrs. *Thomson* wrote on the 18th of April for her husband, as to the date for taking the practice, in which she says, "We will be glad to take the house from Midsummer, and the practice from the 1st of July." That date was afterwards altered. We find, then, the draft agreement sent by Mrs. *Needes* on the 22nd of April: "Herewith the draft agreement, which I think embodies the arrangement mutually arrived at. After perusal kindly return to me, when I will at once forward to Dr. *Thomson's* agent." Well now, I turn to that draft agreement, and I find that draft agreement is an agreement to introduce for three months, from the 1st of June, "To give to the said *W. S. Thomson* an efficient personal introduction for three months, from the 1st of June next, to all the patients and connections of the

said practice, and endeavour to induce them to employ the said *W. S. Thomson* as their medical and surgical attendant, and will otherwise do all in his power to promote the professional success of the said *W. S. Thomson*." Therefore that has a three months' stipulation in it, and more than that it has a clause that if he should be prevented by illness or otherwise from giving that efficient introduction, there is to be an abatement from the purchase-money, shewing therefore that the three months was considered by Mrs. *Needes* and by Dr. *May* as a most important element in the transaction; it was not only a detail, as was pressed upon us by Mr. *Hemming*, but it was the substance of the thing; what was sold was the introduction itself. Then it is said in the draft agreement that the said sum is to be deducted from the purchase-money by mutual agreement, but if not it is to be settled by arbitration, it is not fixed; but there are other conditions as to time, and so on, which I think would have been inserted as a matter of course, and I do not rely therefore much upon that.

Well that being the position of matters, they begin a discussion about repairs. Dr. *May* says he will do nothing towards painting the house, and so on. That is on the 13th of April. Then on the 29th of April we find that Dr. *Thomson* began to be dissatisfied about the repairs, and from that time, as I read the evidence, whether Dr. *Thomson* wished to get out of his bargain, as the Vice-Chancellor says was his opinion, or not, there certainly was no agreement come to. Now that being so, is that negotiation or is it agreement? In my opinion it is clearly negotiation, and it is plain that it never ended in a definite agreement. They never agreed on the subject-matter of the purchase, the introduction and the length of the introduction being the material part of it, and I think we should be making a new contract between the parties, if instead of the three months which was not agreed to, we inserted what has been called "a reasonable time;" that is to say, a time which somebody else thought reasonable, and not the parties themselves. The time stipulated for by Dr. *Thomson* was expressly a three months' introduction, and upon these letters there never was an agreement on the part of Dr. *May* to give a three months' introduction. I think I see the reason; he was not

C. A. 1882 MAY v. HOMSON. Jessel, M.R.

sure that he would be well enough to give it, and he did not wish therefore to bind himself, but if necessary to be relieved from performing that portion of the agreement. I do not think it was an oversight, as has been suggested. I think that all he intended to do was to bind himself to use his best endeavours, and nothing more, to give Dr. *Thomson* an introduction to the patients.

For these reasons I think there was no contract, and the appeal must be dismissed with costs.

LINDLEY, L.J. :—

I am of the same opinion. I have read through the whole of the correspondence from beginning to end with considerable care, and the conclusion at which I have arrived is, that the parties corresponded intending to come to an agreement, fully expecting that they would come to an agreement, knowing perfectly well that the subject-matter of the sale was such that a formal agreement was absolutely essential, and that certain things of very great importance in matters of this kind, which were not alluded to in the letters at all, would have to be discussed and finally settled when they signed the final contract. In other words, it comes to this, without going through the letters critically and step by step, that the parties thought they had agreed to all the more material terms; that some less material terms and matters of detail would have to be discussed and settled by their agents, and that the agents were to prepare the final agreements; and I think they never did intend to be bound until the final agreement was signed.

Now the reasons why I have come to that conclusion are shortly these. First of all this was a sale of a medical practice. It was introduced to the Defendant by Mrs. *Needes* by a letter, which gave him the short heads or particulars of the practice. Then on the 13th of April Dr. *Thomson* writes to Dr. *May*: "I shall be pleased to purchase your lease, &c., on the terms stated in Mrs. *Needes*' letter to me of the 6th of April, namely, premium for practice £1000, lease £500, and furniture at valuation. I shall trust to you to give me the best introduction you can during the three months, and afterwards if necessary."

Now Mrs. *Needes*' particulars said nothing at all about an intro-

duction. Anybody who knows anything about purchasing businesses of this kind knows perfectly well that the price and the introduction are mutually important; the price depends on the introduction if that is fixed, and the introduction depends on the price if the price is fixed. Each acts and reacts on the other, and it is known perfectly well that in negotiating matters of this sort it becomes of the utmost possible importance to settle what sort of introduction is to be given, and what is to happen as regards alteration of terms for the payment of the price or premium if the purchaser does not get the introduction that is bargained for. That was perfectly well known to the parties and to the agents, and yet we have nothing stated in those letters respecting some of those most important matters. And why? Because the parties knew perfectly well that they would be embodied in the agreement which both parties contemplated, and which they would settle when they came to arrange about it.

Now in order to find out whether there has been an actual concluded agreement upon these letters, or whether these letters amount simply to negotiation, the first thing necessary to ascertain is whether the parties contemplated signing a more formal document. In ordinary mercantile business transactions contracts are made by correspondence and agreements result from letters, no more formal documents being required or expected. But this is not that case at all. Here we have to deal with a case in which a formal document was expected. It does not follow that because parties intend to sign a formal document they cannot bind themselves by their letters. That is perfectly well settled by law; but when we examine the intentions of the parties as expressed in these letters, because that is the most important element, what do we find from the whole of the correspondence? It appears to me there is not any portion of this correspondence which can be fairly separated from the rest and be treated as a concluded agreement. It appears to me that each letter is modified by the one which follows it, and that there is never a period throughout at which we can stop and say, Here is a definite and concluded agreement between the parties. The case of *Hussey* v. *Horne-Payne* (1), before the House of Lords, shews that we must look at

(1) 4 App. Cas. 311.

C. A. 1882 MAY v. THOMSON. Lindley, L.J.

the whole correspondence from beginning to end. Of course if we find a few letters which are perfectly plain in themselves, which shew an agreement, and the parties do not follow them up by further correspondence, we have a comparatively easy case; but where each letter is followed immediately by another which suggests something else as a topic of further discussion, it becomes most dangerous to draw a line after any particular letter. Up to the last moment I cannot see that there is anything here amounting to a concluded agreement before the parties came to a quarrel.

It appears to me, therefore, that although the case is perhaps a little on the line, this is a case of negotiation as distinguished from contract, and that not only can no decree for specific performance be granted, but that there can be no action for damages, and consequently that the appeal ought to be dismissed with costs.

HOLKER, L.J.:—I take the same view.

Solicitors: *M. J. Burn; Kearsey, Son & Hawes*, agents for *W. Cousins, Leeds.*

M. W.

C. A. 1882 FRY, J. *April* 27. C. A. *May* 20.

TEEVAN *v.* SMITH.

[1882 T. 531.]

Mortgage—Redemption—Right of Mortgagor to call for an Assignment to a Nominee—Rights of Puisne Mortgagee—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 15.

If there are first and subsequent mortgagees of the same estate, the mortgagor cannot require the first mortgagee to assign the debt and property to a nominee of his own, under the 15th section of the *Conveyancing Act*, 1881, without the consent of the puisne mortgagee.

The "mortgagor entitled to redeem" in that section means a mortgagor, or person claiming under the mortgagor, who has a right to require a reconveyance from the mortgagee; and no other person can take advantage of that section.

The decision of *Fry*, J., affirmed.

ON the 9th of May, 1879, the Plaintiff *Charles James Teevan* assigned his reversionary interest under the will of *W. S. Watton*

to the Defendants *Morton Smith* and *C. Alison* by way of mortgage for securing £6000 and interest.

Shortly afterwards the Plaintiff gave a second mortgage of the same reversion to the trustees of *Watton's* will for securing advances to the extent of £7200.

The interest on the first mortgage having fallen into arrear the defendants advertised the reversion for sale on the 15th of March, 1882.

On the 14th of March the Plaintiff by his solicitor tendered the amount of principal, interest and costs to the Defendants' solicitors, calling upon them at the same time to stop the sale, and transfer the reversion to Mr. *Harrison*, a nominee of their client. The money was however refused by the solicitors on the ground that they had no authority from their clients to receive it. They afterwards stated that their real reason for refusing it was that they had received notice from the second mortgagees that it would be injurious to their interests that the first mortgage should be transferred to the mortgagor's nominee.

The Plaintiff then issued a writ against the defendants to restrain the sale, and obtained an *ex parte* injunction to that effect.

On the same day, before the Defendants' solicitors had received notice of the injunction, they accepted payment of the principal interest and costs from the second mortgagees, and the defendants soon afterwards transferred their mortgage to them.

On the 30th of March, 1882, the Defendants, the first mortgagees, moved to dissolve the injunction. The motion was ordered to stand over in order that the second mortgagees might be made parties to the action.

The motion came on to be heard before Mr. Justice *Fry* on the 27th of April, 1882.

Glasse, Q.C., and *Jason Smith*, for the first mortgagees.

Cookson, Q.C., and *Kenyon Parker*, for the Plaintiff.

J. Pearson, Q.C., and *Ingle Joyce*, for the second mortgagees.

FRY, J.:—

The Plaintiff in this case is the mortgagor of a reversionary

C. A. 1882 TEEVAN v. SMITH. Fry, J.

property. The original Defendants in the action were the first mortgagees of the property. It appeared from the evidence before me, when I granted the injunction on the 15th of March, that on the day previous a sum of £6490 had been tendered on behalf of Mr. *Harrison* to the Defendants with a request from the Plaintiff that the first mortgagees would transfer their security to Mr. *Harrison*. It further appeared that the Plaintiff had been anxious to obtain the names of the mortgagees which he had forgotten, that he did not get much assistance in ascertaining those names from the solicitors of the Defendants, and that consequently he had not been able to tender to the Defendants themselves the money; but it also appeared that he was willing to pay that sum into Court, and so prevent the sale of the reversion which might, of course, have been extremely injurious to the Plaintiff's interests.

In that state of circumstances I, on the usual undertaking, granted the injunction to restrain the Defendants from disposing of the mortgaged property until the hearing or further order. It now appears that there were second mortgagees of the property, and that, before notice of the injunction was served upon the Defendants, those mortgagees had tendered £6700 in the form of a cheque to the solicitors for the Defendants; that that sum had been accepted by the solicitors and had been paid into the bank, and that subsequently that act of the solicitors had been ratified by the Defendants themselves. The question, therefore, which originally stood merely between the mortgagor and the first mortgagees, has now become one between the mortgagor and the second mortgagees, because the second mortgagees now claim the right to redeem in priority to the nominee of the mortgagor. And inasmuch as the second mortgagees were not before the Court when I granted the injunction, and inasmuch as they wished to realise their security, which was very natural and very proper, it is plain that I must determine the question, if it requires determination, with regard to the exact position of things as between the mortgagor and the second mortgagees at the moment when I granted the injunction. How did matters stand at that moment between the parties? The Plaintiff had made a tender, which I will assume was sufficient in point of amount, to the solicitors of

C. A.
1882
TEEVAN
v.
SMITH.
Fry, J.

the original Defendants, the first mortgagees. From the evidence, it appears to me that those solicitors had no authority to receive that money. The tender, therefore, was not a good tender as against any person who might be entitled to object. It was, therefore, not a tender which could affect the rights of persons who were not before the Court when the injunction was granted. Before the injunction was granted the second mortgagees themselves had made a like tender to the solicitors of the first mortgagees. For the same reason that tender was not good, because there was no authority to accept it, and, therefore, at the time I granted the injunction, both the mortgagor and the second mortgagees were struggling with the first for the right to redeem. I repeat that my decision having been in the absence of the second mortgagees, I must determine their rights as if that injunction had not been granted. Therefore it comes to this question, which of those two persons, neither having made a valid tender, has the right to redeem? It appears to me to be plain that the mortgagor, by mortgaging the property to the second mortgagees, has made them his assigns, and that as between him and them the second mortgagees have the preferable right. That preferable right to redeem is not in any way affected by the injunction I granted behind the back of the second mortgagees, and therefore I cannot hold the injunction as against the second mortgagees, who claim the right. I must therefore dissolve the injunction.

The only other argument addressed to me on behalf of the Plaintiff is this: it is said that even if the Plaintiff is not clearly right there is no harm in allowing the injunction to remain till the hearing. The answer to that, in my opinion, is this, that I ought to act on what I believe to be the correct view of the *primâ facie* rights of the parties. If, on further consideration, the view as now expressed as to the second mortgagees shall be found wrong, the Court can at the hearing set that right by directing the second mortgagees to convey their security to the mortgagor. I therefore dissolve the injunction.

From this decision the Plaintiff appealed. C. A.

The appeal was heard on the 20th of May, 1882.

C. A. 1882 TEEVAN v. SMITH.

Cookson, Q.C., and *Kenyon Parker*, for the Appellant:—

Mr. Justice *Fry* decided the case on the general law of mortgages as it existed before the *Conveyancing Act*, 1881. He held that neither tender was good, but that the second mortgagees had a prior right to the mortgagor to redeem, and to call upon the first mortgagees to convey to them the legal estate. But we rely upon the terms of the 15th section of the *Conveyancing Act*, 1881 (1). By that Act an absolute right is given to the mortgagor to call upon the first mortgagees to convey the legal estate to his nominee. The Act was intended to give the mortgagor a right which he had not before. The second mortgagee is not prejudiced. He still retains the same position with respect to the estate. At all events, at the time when the writ was issued we were entitled to stop the sale of the property, which would have been an irreparable injury to us.

Glasse, Q.C., and *Jason Smith*, for the first mortgagees, were not called on.

J. Pearson, Q.C., and *Ingle Joyce*, for the second mortgagees.

JESSEL, M.R.:—

The question as to the construction of the 15th section of the *Conveyancing Act*, 1881, does not appear to have been much discussed before Mr. Justice *Fry*. But when we come to look at that section it appears to me quite plain what the meaning of it is. We must remember what the law was before that Act was passed. A mortgagor had only a right to redeem and to have a reconveyance on payment of the mortgage debt. Hence a difficulty arose, for lenders were willing to advance money if they could have a transfer of the mortgage security, but were not willing to take a security directly from the mortgagor, dreading intermediate incumbrances. At that time the debt was not

(1) 44 & 45 Vict. c. 41, s. 15: "Where a mortgagor is entitled to redeem, he shall, by virtue of this Act, have power to require the mortgagee, instead of reconveying, and on the terms on which he would be bound to reconvey, to assign the mortgage debt and convey the mortgaged property to any third person, as the mortgagor directs; and the mortgagee shall, by virtue of this Act, be bound to assign and convey accordingly."

transferable, so that a power of attorney was necessary; therefore the old decisions were right in laying down that a mortgagee was not to be required to run the risk of being made liable to costs, which he might be, if he transferred the debt to a third person. Now the difficulty has been got rid of, by making the debt transferable at law, so that no power of attorney is required and all ground of objection on the part of a mortgagee to transfer the security is taken away. It can do him no harm in any way.

Then what are the words of the 15th section of the Act of 1881? It says "Where a mortgagor is entitled to redeem." Every mortgagor is entitled to redeem, but there is a difference in their rights. Where there is one mortgagor and one mortgagee, there, of course, his right to redeem is absolute. But where there are several successive mortgagees the mortgagor can redeem the next to him without redeeming any other; but if he wishes to redeem any anterior mortgage he must also redeem all who are between that mortgagee and himself. A puisne mortgagee indeed is in rather a worse position than this; for, although he is entitled to redeem those above him, he cannot do so without foreclosing those between himself and the ultimate equity of redemption. So that the words "where a mortgagor is entitled to redeem" really includes every mortgagor, except a mortgagor who is precluded by some special term in his mortgage deed from redeeming within a specific time. For although the law will not allow a mortgagor to be precluded from redeeming altogether, yet he may be precluded from redeeming for a fixed period, such as five or seven years. That is why the words "where a mortgagor is entitled to redeem," are inserted. They mean where a mortgagor is not precluded from redeeming for a certain time by some special stipulation. Then it says, "he shall have power to require the mortgagee, instead of reconveying, and on the terms on which he would be bound to reconvey, to assign the mortgage debt and convey the mortgaged property to any third person." It is only "instead of reconveying." The section assumes two things: First, that the mortgagee is bound to reconvey to the person applying to him, and, secondly, that the transfer is to be instead of a reconveyance. Then see how it works. Where there are first and second mortgagees, and the first mortgagee has notice of the second, when

C. A. 1882 TEEVAN v. SMITH. Jessel, M.R.

he is paid off he becomes a trustee of the legal estate for him. The word "reconvey" is the proper word to use; it is strictly a reconveyance. If the first mortgagee is paid off by the mortgagor, he is not bound to reconvey the estate to him; but if he is paid off by the second mortgagee, he is bound to reconvey it to him. The second mortgagee is a mortgagor under the definition in the Act (s. 2). He is an assign of the mortgagor and is entitled to redeem. It appears to me that no person can avail himself of the 15th section who is not entitled to call for a reconveyance of the estate from the mortgagee. The Act never intended to effect any change in the person who was entitled to call for a reconveyance.

There is another point, which does not arise in the view which I take of the section, but which I may mention. Every person who is behind the first mortgagee is entitled to redeem, and is a mortgagor within the meaning of the section, and if there are several successive mortgagees of the same mortgagor, which of them has a right in priority to the others to call upon the first mortgagee to assign the mortgage? It must be that one who is next to him. The first incumbrancer has the first right to redeem, and it is impossible to suppose that it was intended that a puisne mortgagee was to have the right to call for a transfer of the first mortgage, before one who is prior to himself.

It is alleged that there was a tender in this case by the mortgagor, but a tender is not payment; and according to my view of the case, it would have been immaterial, even if there had been actual payment by the mortgagor. If before the reconveyance is made the second mortgagee calls on the first to reconvey he must have the prior right. He is the mortgagor of the estate as between himself and all behind him, and he has the prior right to require a reconveyance or a transfer.

LINDLEY, L.J.:—

I am of the same opinion. I see no difficulty in the construction of this section. All that is necessary for understanding its meaning is to remember what was the law before it was passed. In *Fisher* on Mortgages (1) the rule is thus stated: "A mort-

(1) 3rd Ed. vol. ii. p. 1025.

gagee is not bound to assign the estate, after payment, to the mortgagor or his nominee, if he have notice of an equitable claim by another person on the estate." That is, where there are several mortgages, the mortgagor, although entitled to redeem, is not entitled to call for a reconveyance from the first mortgagee. When we look at the interpretation clause in the *Conveyancing Act*, we find that any one entitled to redeem is a mortgagor within the meaning of the section. Then the 15th section says, "instead of reconveying;" that is the key to the whole section. The mortgagor there must be some one who has the right to require a reconveyance. If that be the true view it makes an end of the whole controversy. The second mortgagee seeks to obtain, and has in fact, obtained, a reconveyance; but the mortgagor says "No, I will have the first mortgagee transfer the estate to my nominee." I am of opinion that he has no such right as he claims.

The appeal and the action must be dismissed with costs.

Solicitors: *C. & S. Harrison & Co.; R. S. Taylor, Son, & Humbert; Harting, Son, & Ellis.*

M. W.

UPTON *v.* BROWN.

[1875 U. 1A.]

Practice—Accounts in Chambers—Adjournment of disputed Items before the Judge—Costs.

Where accounts are being taken in Chambers before the Chief Clerk, either party has a right to have an item which has been found against him adjourned before the Judge without taking out a summons for that purpose. And where a question of principle is involved in a particular item it may be necessary to do this. But the ordinary practice is to wait till the account is completed, and then take the adjournment once for all before the Judge.

If a solicitor were to insist upon his right to take particular items before the Judge in an unreasonable manner, the Court might make him pay the costs personally.

IN this case, the hearing of which is reported (1), when the accounts were being taken before the Chief Clerk in Chambers,

(1) 12 Ch. D. 872.

C. A. 1882 UPTON v. BROWN.

the question arose whether if either of the parties was dissatisfied with the allowance or disallowance of an item by the Chief Clerk, he was entitled to have the question at once adjourned before the Judge, or whether he ought to take out a summons for that purpose. Mr. Justice *Fry* was of opinion that a fresh summons should be taken out, and the matter was then brought before the Court of Appeal in order that the practice might be settled.

J. M. Lloyd, and *Caldecott*, appeared for the various parties.

JESSEL, M.R.:—

It is desirable that the practice on this subject should be understood. Under the *Chancery Amendment Act*, 1852, it is the right of the suitor to have the matter at once adjourned before the Judge without taking out any summons. Of course if a solicitor took an adjournment before the Judge of every item in an account no business could be transacted. In theory there is a right to do this, but in practice it is found impossible that it should be done. And though the Act has been in force for thirty years, such has been the good sense of solicitors that I am not aware that any difficulty has ever arisen. The practice is to wait until the taking of the account is completed, and then to take an adjournment once for all to the Judge. When, however, a question of principle is involved in an item which decides the mode in which the account is to be taken, it is, of course, impossible to wait until the account is completed, and then it is quite right to adjourn the item at once before the Judge. If a solicitor were so unreasonable as to insist on the adjournment of every item in an account to which he might object, that would be an abuse of the process of the Court, and I have no doubt the Judge would have jurisdiction to punish the solicitor by making him pay the costs personally. I hope, however, that such a case will never arise.

LINDLEY, L.J., concurred.

Solicitors: *Shum, Crossman & Co.; R. Ballard.*

M. W.

LITTLE *v.* KINGSWOOD COLLIERIES COMPANY.

C. A.
1882
V.-C. H.
April 18.
C. A.
May 24, 25.

[1882 L. No. 814.]

Solicitor—Acting against Former Client—Injunction.

Held, by *Hall*, V.C., that the jurisdiction to restrain a solicitor from acting for the antagonist of his former client is founded upon the principle that a man ought to be restrained from doing any act contrary to the duty he owes to another; and that it will be exercised at the instance of the former client, irrespective of the question whether the solicitor was discharged by him or had discharged himself, whenever the transaction in reference to which the injunction is sought so flows out of or is connected with that in which the solicitor was formerly retained that the same matter of dispute may probably arise.

Hutchins v. *Hutchins* (1) and *Biggs* v. *Head* (2) approved and adopted.

On appeal, the injunction granted by the Vice-Chancellor was disapproved and dissolved by consent, the solicitor undertaking not to disclose his client's secrets.

THE Defendant, *Basil Arnold Dyer*, was a solicitor, who prior to August, 1880, had acted on several occasions as the solicitor of the *Kingswood and Parkfield Collieries Company*, although he was not their regular solicitor. In that month the Plaintiff, who was one of the directors of the company, made a claim against the company for various alleged advances amounting to about £5000, which claim was disputed by the company upon the ground that the Plaintiff was indebted to them in a larger sum in respect of transactions connected with the formation of the company, and they claimed to set off such indebtedness against the Plaintiff's claim. The Plaintiff retained the Defendant *Dyer* as his solicitor in the prosecution of this claim, and, as he alleged, gave him confidentially full information as to the details of his claims, and the various facts and circumstances on which he relied as a defence against any counter-claim on the part of the company.

Negotiations then took place which resulted in the Plaintiff's accepting, at the end of November, 1881, by *Dyer's* advice, certain debentures of the company, the first of which was made payable on the 30th of June, 1881, in satisfaction of his claim.

In February, 1882, the Plaintiff became, as he alleged, dis-

(1) 1 Hogan, 315. (2) Sausse & Scully, 335.

C. A. 1882 — LITTLE v. KINGSWOOD COLLIERIES COMPANY.

satisfied with the Defendant *Dyer*, and having obtained from him an account of his charges in respect of the negotiations with the company, he paid these charges, which amounted to £18 18*s*., and *Dyer* ceased to act for him.

On the 4th of February, 1882, the debenture which became payable on the 30th of June, 1881, not having been paid, the Plaintiff commenced an action of *Little* v. *Kingswood, &c., Company* (1882 L. No. 578), for payment of the amount due thereunder, and on the 8th of February an appearance was entered for the company by the Defendant *Dyer* as their solicitor.

In March, 1882, the Defendant *Dyer* commenced an action against the Plaintiff for slander and libel in having attributed to him at a meeting of the directors of the company a breach of professional confidence.

The Plaintiff then brought the present action for an injunction to restrain the Defendant company "from employing the Defendant *Dyer* as their solicitor in the action of *Little* v. *Kingswood, &c., Company* (1882 L. 578), and to restrain the Defendant *Dyer*, his agents and clerks, from acting as their solicitor therein, and from making use of or allowing any person to make copies of or extracts from any documents which had come to his hands in his professional capacity as solicitor to the Plaintiff, and from imparting any information with regard to the Plaintiff on the subject of the said action 1882 L. No. 578;" and he now moved accordingly.

It appeared from the affidavit of Mr. *Handel Cossham*, the chairman of the company, in opposition to the motion, that the company's version of the arrangement of November, 1881, was that as the debentures matured they were to be set off *pro tanto* against the Plaintiff's debt, and that in the Plaintiff's action to enforce his debenture the company would not dispute the debentures, but intended "to set off against the said debentures a claim which the company has against the said *Robert Little*, and upon which I always on behalf of the company insisted at the time of the negotiations and at the time the debentures were given." The Plaintiff in his evidence alleged that the Defendant *Dyer* was in possession of a number of letters written by the Plaintiff to him containing confidential communications bearing upon the counterclaim of the company; but the Defendant *Dyer* in his affidavits

denied that he had any such letters or any documents of the Plaintiff's in his possession, or that he was in possession of any knowledge or information which had not throughout been known to the company, or of any fact, argument, or explanation acquired by him as solicitor to the Plaintiff which could in any way prejudice or embarrass the Plaintiff in his action against the company, or that he had ever disclosed anything to the Defendant company, and stated that he was not aware of any single fact communicated to him by the Plaintiff which he could disclose or use in any way to embarrass the Plaintiff.

The rest of the evidence will sufficiently appear from the judgment of the Vice-Chancellor. The motion was heard before Vice-Chancellor *Hall* on the 18th of April, 1882.

W. Pearson, Q.C., and *E. W. Byrne*, for the Plaintiff:—

The jurisdiction to restrain a solicitor from acting for the antagonist of a former client, is founded upon the duty owed by the solicitor not to communicate to the prejudice of the former client any information that he may have acquired in the confidential character of solicitor. For it is the privilege of the client, attaching from the retainer (which always implies confidence) that the solicitor shall not disclose his secrets; and this privilege continues after the relation of solicitor and client has ceased to exist, and for all future time. And the jurisdiction will be exercised whenever the second matter is so connected with the first that some disclosure prejudicial to the former client may reasonably be anticipated. This is obviously the case here, for the company propose to set up the same defence as they did on the former occasion, when Mr. *Dyer* acted for the Plaintiff and against them. The leading case upon the point is *Cholmondeley* v. *Clinton* (1). There the solicitor discharged himself, but this does not affect the principle, as is shewn by the cases of *Hutchins* v. *Hutchins* (2), and *Biggs* v. *Head* (3), and by the cases (reported in the notes to *Biggs* v. *Head*) of *Hobhouse* v. *Hamilton* (4), *Brady* v. *Lawless* (5), and *Waller* v. *Fowler* (6).

(1) 19 Ves. 261.
(2) 1 Hogan, 315.
(3) Sausse & Scully, 335.
(4) Sausse & Scully, 359.
(5) Ibid. 365.
(6) Ibid. 369.

C. A.
1882
LITTLE
v.
KINGSWOOD
COLLIERIES
COMPANY.

These are all decisions of the Irish Rolls Court during the time of Sir *Michael O'Loghlen*, Master of the Rolls, but they are sound in principle, and will be adopted by this Court. In *Hutchins* v. *Hutchins* (1) the solicitor had been discharged, and the Master of the Rolls in granting the injunction said: "If the principle on which relief is given by injunction be sound, it seems difficult and inconvenient to make it depend upon the solution of the question whether the solicitor has retired from the client or whether they have parted by mutual consent, or whether the client has changed him without any adequate cause, or has been compelled to dismiss him on account of misconduct or neglect." In *Biggs* v. *Head* (2) the solicitor had been discharged, and it was held that there was no substantial distinction between his case and that of a solicitor who had refused to act; and this was the case also in *Hobhouse* v. *Hamilton* (3) and *Waller* v. *Fowler* (4), while in *Brady* v. *Lawless* (5) the solicitor had ceased to act. As was pointed out in *Biggs* v. *Head*, the case of a discharged solicitor would appear to require the application of the jurisdiction of the Court more strongly than any other, for the angry feelings of the solicitor might induce him to act in a more hostile manner against his former client; and, moreover, the discharge of the solicitor might be owing to his own misconduct, and it would be a strange result if the client were to lose his privilege on account of his solicitor's misconduct.

Hastings, Q.C., and *E. Ford*, for the Defendants:—

There is no instance in which an English Court has granted such an injunction as is now asked for in a case where the solicitor has been discharged by his former client.

The decision in *Cholmondeley* v. *Clinton* (6) was obviously based upon the fact that the solicitor had discharged himself, and although that was a gross case, Lord *Eldon* felt great difficulty in granting the injunction. In *Beer* v. *Ward* (7), Lord *Eldon* said (8): "In *Cholmondeley* v. *Clinton* I had great difficulty to know how to act, and I took the opinions of the Judges. There

(1) 1 Hogan, 315.
(2) Sausse & Scully, 335.
(3) Ibid. 359.
(4) Ibid. 369.
(5) Sausse & Scully, 365.
(6) 19 Ves. 261.
(7) Jacob, 77.
(8) Ibid. 82.

the gentleman who had been concerned for Lord *Clinton* discharged himself and went over to the other side. It appeared to me and to all the Judges that nothing could be more dangerous than to permit a solicitor employed by *A.*, in a cause between him and *B.*, to leave *A.* while still willing to retain him and enter into the service of *B.*" And in *Bricheno* v. *Thorp* (1), Lord *Eldon's* language shews that the injunction would not be granted except in a case where the solicitor voluntarily turns his back upon his client and goes into the service of the person against whom he has been employed. Again in *Davies* v. *Clough* (2) the Court interfered "not because the solicitor was discharged by his former client, but because he made an exorbitant demand which was resisted and ultimately defeated; so that he virtually discharged himself."

The distinction is also recognised in *Parrott* v. *Parrott* (3) and in *In re Electric Lighting Company* (4). The Irish decisions relied on as extending the rule to cases where the solicitor has been discharged by his client, are accordingly contrary to the current of the English decisions, and will not be adopted here. This action is in reality a counterblast to the Defendant *Dyer's* action of slander.

W. Pearson, in reply:—

In *In re Electric Lighting Company* the solicitor had never acted for the company (the first clients) in the particular matter; —a new and independent one, in which he was acting for the petitioning creditor; and this, and not the fact that the solicitor had discharged himself, was the ground of the decision. It is immaterial whether the solicitor discharges the client or the client the solicitor. The true principle is that the solicitor of *A.* cannot go to *B.* and communicate to him what he has learned in his professional capacity as *A.'s* solicitor.

He also referred to *Hutchinson* v. *Newark* (5).

HALL, V.C.:—

With regard to the interference of the Court in cases of this

(1) Jacob, 300.
(2) 8 Sim. 262, 267.
(3) 2 De G. & Sm. 258.
(4) 25 W. R. 603.
(5) 3 De G. & Sm. 727.

C. A. 1882 LITTLE v. KINGSWOOD COLLIERIES COMPANY. V.-C. H.

kind, it seems to me to be very difficult, and probably impossible, to lay down any rule of general application, seeing that the circumstances in the different cases are so different. But I must endeavour if I can to ascertain something like a principle which can be applied in the present case, and in that endeavour I think I am considerably assisted by the course of the decisions. The case of *Cholmondeley* v. *Clinton* (1) was one as to which Lord *Eldon* originally said he felt embarrassed, but which he subsequently (as appears by his judgment in *Bricheno* v. *Thorp* (2)) seems to have thought a plain and clear case. That case was decided on a principle which I think can and should be applied to the present case.

The Defendant Mr. *Dyer* previously to his employment as solicitor by the Plaintiff Mr. *Little*, seems to have been employed by the company. He seems to have been a friend of the chairman of the company, and the Plaintiff knowing this, appears to have felt some little delicacy about employing him as his solicitor in the dispute which he had with the company. He therefore before employing him, put the matter to him fairly and clearly by asking him in effect, "Is there any difficulty about your acting as my solicitor in this matter?" If there had at that time been any difficulty, or anything likely to give occasion to a difficulty, Mr. *Dyer* ought to, and I must assume would, have said to the Plaintiff, "You had better have nothing to do with me: I am so connected with the company that I could not do the matter justice." Not having said that, and having accepted the employment, Mr. *Dyer* must, I think, be taken to have weighed the matter and to have known that his tongue would be tied, not merely with reference to that particular transaction, but for the future, and if knowing this he says there will be no difficulty in his acting, he must take the consequences of his so doing, and it is not for him to complain if he finds himself shut out from some subsequent business in which he might have been employed if he had not been connected with this transaction on behalf of Mr. *Little*. The world is large enough, and the number of solicitors in it large enough, to let the small number of transactions in which difficulties of this character arise be fairly distributed. Nearly

(1) 19 Ves. 261 (2) Jacob, 300, 303.

all solicitors get fairly well employed, and they are content to run these risks. Well, the employment of Mr. *Dyer* resulted in something in the nature of a compromise or adjustment of the dispute between the parties under which Mr. *Little* acquired certain debentures of the company, being advised, as he says, by Mr. *Dyer* that this would put an end to the dispute. But I have nothing to do with that, and it is perhaps not very important or material whether he was so advised, or whether it was good advice or not. That was, however, the conclusion of that proceeding. The company having thus come under engagements to Mr. *Little* in respect of the debentures held by him, Mr. *Little*, when the time came, desired to put one of them in force and to obtain payment, and brought an action for that purpose. Now the company say that they do not mean to dispute the debentures; but whether that is so or not, it is at all events sufficiently plain that it is not unlikely they may set up something in the nature of a set-off or counter-claim; and that was one of the matters which it was apprehended would be gone into on the occasion when Mr. *Dyer* was employed by Mr. *Little*. It therefore seems to me reasonably plain that Mr. *Dyer* may, and I might almost say must, have means of giving information to the company bearing upon the matter in dispute between them and the Plaintiff. Whether or not he would consider himself justified in giving such information I do not say; but if the company employ him as their solicitor he will be in a false position, and one which a solicitor ought not to occupy with reference to a former employer. I cannot say that the non-employment of Mr. *Dyer* by Mr. *Little* in the new proceeding is to be deemed or dealt with as being in the nature of a discharge of him by that gentleman—such as has given rise to much observation and discussion in cases of this kind. I do not look upon it as a discharge in any sense affecting the consideration of the questions in this case. I rather look at the matter in this light. This action to enforce the debentures really flows out of the original transaction and may be considered as something in the nature of a continuance of, or supplemental to the former proceeding, so that it would not be right for Mr. *Dyer* now to say that unless he was employed in it by the Plaintiff he should hold himself absolved and should act for the company. I should

C. A.
1882
LITTLE
v.
KINGSWOOD
COLLIERIES
COMPANY.
V.-C. H.

rather say that he ought not to have anything to do with it, and that if it was put to him by the company whether he would take upon himself to act against his former client, he ought to decline to act. I consider moreover, and will go so far as to say, that I do not think the case turns or depends on the discharge or non-discharge of the solicitor by his former client. There are broader principles applicable to cases of this kind, and in applying those principles fairly and reasonably to the facts of the case, while on the one hand it is the duty of the Court to see that it does not unduly prevent the employment of the solicitor, and that it does not unduly or improperly deprive the party who is about to give the employment of the assistance of the particular person whom he desires to employ, and while the Court must not do that recklessly or without consideration, yet, on the other hand, where the second transaction flows out of the first, and from the nature of the dispute, is so connected with it as I consider this to be, the new client ought not to employ that particular solicitor in the transaction, and the solicitor ought not to accept the employment, and the case is then one in which at the instance of the former client the solicitor ought upon general principles of equity to be restrained from so acting. Without going through all the different cases which have been referred to, I may observe that I think the general principles of the decisions of the Irish Courts are sound and correct. I am glad that there are so few of these cases in this Court. It is several years since I had one before me, and that was the case of *In re Electric Lighting Company* (1) already referred to, which I do not think favourable to the company in this particular case, but rather read the other way. I think the general principle is to be collected from *Cholmondeley* v. *Clinton* (2); and Lord *Cottenham* in *Dietrichsen* v. *Cabburn* (3) observes upon that case as follows: "The equitable jurisdiction to restrain by injunction an act which the defendant by contract or duty was bound to abstain from, cannot be confined to cases in which the Court has jurisdiction over the acts of the plaintiff; for if that were so, it could not interfere to restrain the violation of contracts by tenants, or of duty by agents," as in the two cases

(1) 25 W. R. 603.
(2) 19 Ves. 261.
(3) 2 Ph. 52, 57.

to which he refers, "or by an attorney, as in *Cholmondeley* v. *Clinton* (1); in none of which cases was there anything to be done by the plaintiff which equity could enforce." Of course those observations had reference only to that particular case; but *Cholmondeley* v. *Clinton* is referred to upon the general equity to restrain an attorney from acting contrary to his duty. And I think it would be contrary to his duty in this case to undertake the employment of the company. I do not forget what has been said about Mr. *Dyer's* having acted for the company in one particular transaction, and possibly on some other occasions, but I think that in justice to mankind and to persons who have the misfortune to be involved in litigation in this Court, it is necessary in a case like the present to restrain the solicitor from acting. With reference to the form of the order, I think the injunction should restrain Mr. *Dyer* from imparting "to any person without the Plaintiff's consent, any information on the subject of the action of 1882 L. No. 578." With this variation the order will be in the terms of the notice of motion, and the costs will be costs in the action.

W. W. K.

C. A.

The company and Mr. *Dyer* appealed from this order. The appeal came on to be heard on the 24th of May, 1882.

Hastings, Q.C., and *E. Ford*, appeared for the Appellants.

W. Pearson, Q.C., and *E. W. Byrne*, for the Plaintiff.

When the appeal had been opened the Court (*Jessel*, M.R., and *Lindley*, L.J.) suggested an arrangement between the parties, which was agreed to by their counsel.

The terms of the arrangement were as follows:—The Plaintiff unreservedly withdrawing the expressions used by him in relation to *Dyer*, for which the action for slander had been brought, and *Dyer* undertaking that all further proceedings in that action should be stayed, without costs, and also undertaking not to communicate to the company anything which had come to his knowledge as solicitor for the Plaintiff; the order of Vice-Chancellor *Hall* to be discharged, and this action stayed, without costs.

(1) 19 Ves. 261.

C. A. 1882 LITTLE v. KINGSWOOD COLLIERIES COMPANY.

In the course of the argument,

JESSEL, M.R., said that he thought the form of the injunction by which not only Mr. *Dyer* was restrained from acting for the company, but the company were restrained from employing Mr. *Dyer*, was erroneous, there being in this case no special equity against the company. It also appeared to him that the judgment of the Vice-Chancellor went further than the cases in the Irish Court on which he relied. It must be remembered that it does not follow that because a solicitor may be at liberty to act for an opponent of his former client, he is at liberty to disclose his former client's secrets to his opponent.

Solicitors for Plaintiffs: *Torr, Janeways, Gribble, & Oddie*, agents for *E. E. Salmon, Bristol.*

Solicitors for Defendants: *Merediths, Roberts, & Mills.*

M. W.

C. A. 1882 *July* 15.

PAUL *v.* PAUL.

[1878 P. 105.]

Marriage Settlement of Wife's Property—Gift to Next of Kin of Wife in Default of Wife's Assignment by Will—Power of Revocation—Volunteers.

By a marriage settlement the wife's property was settled, after life estates in the husband and wife and in default of children, in the event of the wife surviving, on her, and in the event of the husband surviving, as the wife should by will appoint, and in default, on her next of kin, excluding the husband:—

Held (affirming the decision of *Fry*, J.), that the trust in favour of the next of kin could not be revoked, and that although there was no possibility of issue, the husband and wife together were not entitled to the *corpus* of the settled fund.

Paul v. *Paul* (1) overruled.

THIS was an appeal from the decision of Mr. Justice *Fry* (2).

By the settlement on the marriage of *Barbara Paul*, the Petitioner, with her husband, dated the 2nd of November, 1845, the fortune of the Petitioner was settled upon the husband and wife successively for life with remainder to the children of the marriage.

(1) 15 Ch. D. 580. (2) 19 Ch. D. 47.

There were no children of the marriage, and the Petitioner was past the age of childbearing.

In default of children of the marriage the property was settled on the Petitioner absolutely if she survived her husband, but if she died in his lifetime, she had a general power to appoint the property by will, and in default of appointment it was settled on her next of kin, excluding her husband.

On the 24th of March, 1864, the Petitioner and her husband executed a separation deed, which provided that during the husband's life half the income of the trust funds should be paid to the Petitioner for her separate use.

This action was instituted for the administration of the trusts of the settlement and of the separation deed.

On the 23rd of July, 1880, Vice-Chancellor *Malins* made an order, on the motion of the Petitioner with the consent of the husband, that a part of the capital of the trust fund should be applied in payment of debts incurred by the Petitioner (1).

Mrs. *Paul* now presented a petition, with the consent of her husband, for the payment to herself and her husband of the rest of the capital of the funds comprised in her marriage settlement, on the ground that in the events which had happened the only persons who had any interest therein were volunteers, whose interest she was able to revoke.

Mr. Justice *Fry* refused to make any order on the petition, considering that the decision of Vice-Chancellor *Malins* on the former petition was erroneous. The Petitioner appealed.

Everitt, Q.C., and *Mulligan*, for the Appellant:—

The next of kin are merely volunteers, and they have no equity to prevent the settlors from setting aside the limitation to them. It was the intention of the settlement that in default of children the husband and wife should be able to dispose of the fund: *Hastings* v. *Orde* (2); *Heatley* v. *Thomas* (3); *Paul* v. *Paul.* (1)

Whitehorne, Q.C., for the husband.

(1) 15 Ch. D. 580. (2) 11 Sim. 205.
(3) 15 Ves. 596.

C. A. 1882 PAUL v. PAUL

J. Pearson, Q.C., and *Ingham*, for the trustees of the settlement.

JESSEL, M.R.:—

In this case a trust was declared by the settlement for the next of kin of the lady, and the fund has been transferred to the trustees. The fact of their being volunteers does not enable the trustees to part with it without the consent of their *cestuis que trust*. That has been the rule ever since the Court of Chancery existed. The appeal must be dismissed.

BRETT, L.J., concurred.

COTTON, L.J.:—

I also agree. The next of kin of the lady are *cestuis que trust* under the settlement, although they are not yet ascertained. I assume that the trust would not have been enforced if it were still executory. But this trust is executed, and the next of kin have an interest as *cestuis que trust*. It is immaterial that they are volunteers. The trust cannot be broken on that account, and if the trustees were to part with the fund they would be guilty of a breach of trust. Vice-Chancellor *Malins* when he made the order on the former petition does not appear to have had his attention directed to the fact that the trust was executed.

Solicitors: *Meynell & Pemberton; G. S. Hare; Munns & Longden.*

M. W.

RICKETTS *v.* LEWIS.

FRY, J.
1882
April 3.

[1874 R. 159.]

Administrator—Power to mortgage Leaseholds of Intestate—Repairs.

An administrator has no power to mortgage leaseholds of the intestate under leases not containing repairing covenants, in order to raise money for repairing the property.

And such a mortgage will be set aside as against a mortgagee who has notice of the purpose for which the money is raised.

ADJOURNED SUMMONS.

This suit was instituted for the sale of some leasehold messuages and farms known as *Pentwyn* and *Tir Kenol*, in the county of *Brecon*, and the division of the proceeds of sale amongst the persons entitled thereto, or in the alternative for a partition.

The leases under which the properties were held were granted in the 20th and 23rd years of the reign of Queen *Elizabeth* for terms of 999 years. The leases were not produced, and it did not appear whether they contained any covenants by the lessee to repair the houses. The leases ultimately became vested in one *E. W. Lewis*, who died a bachelor and intestate on the 19th of December, 1828, leaving his father, *Walter Lewis*, his sole next of kin. *Walter Lewis* died intestate on the 4th of September, 1833. Letters of administration to the estate and effects of *E. W. Lewis* and also of *Walter Lewis* were in 1852 granted to *Margaret Lewis*, one of the Defendants, who was a daughter of *Walter Lewis*. The Plaintiffs were the executors of one *John Ricketts*, and they claimed, by virtue of an assignment to him by one of the next of kin of *Walter Lewis*, to be entitled to an undivided sixth part of the leaseholds. Two others of the next of kin were also Defendants. It was admitted on the hearing of the summons that the debts of *E. W. Lewis* and of *Walter Lewis* had been paid. In addition to a sale the Plaintiffs asked for an account of the rents and profits of the leasehold premises received by the Defendant *Margaret Lewis*, and that she might be ordered to pay one-sixth part of what she had received to them, after deducting all proper outgoings.

On the 19th of November, 1877, an order was made directing

FRY, J.
1882
RICKETTS
v.
LEWIS.

an inquiry who were the persons interested in the leasehold properties and in what shares, and an account of the rents and profits received by the Defendant *Margaret Lewis*, and of all outgoings properly expended by her since the 6th of August, 1860.

By his certificate, dated the 31st of January, 1882, the Chief Clerk found that several mortgages of the property had been created by *Margaret Lewis* in favour of *C. H. James*, who was her solicitor, and he found that there was due to *James* in respect of his securities the sum of £1958 17*s.* 5*d.*, consisting of £1800 principal and £158 17*s.* 5*d.* interest, of which £1150 principal and £101 9*s.* 9*d.* interest were a charge on the entirety of the estate, and £650 principal, and £57 7*s.* 8*d.* interest were a charge on the share of the Defendant *Margaret Lewis*. And he found that subject to the charge of £1150 principal, and £101 9*s.* 9*d.* interest, the Plaintiffs were entitled to two twenty-fourths of the property absolutely; the Defendant *Margaret Lewis* was, subject to the charge of £650 and interest, entitled absolutely to twenty twenty-fourths, and one *Maria Jones*, who had liberty to attend the proceedings, was entitled to the remaining two twenty-fourths absolutely.

The Plaintiffs took out a summons to vary the certificate by finding that no part of the charges in favour of *James* were charges on the entirety of the leasehold properties, but that the whole of those charges were charges only on the shares of *Margaret Lewis*.

The only part of the charges which the Plaintiffs sought to have disallowed as against the entirety of the property which is material for the purpose of this report was a sum of £100 which the Defendant *Margaret Lewis* had raised for the purpose of repairing the leasehold premises. This sum of £100 was secured by an indenture of further charge, dated the 30th of June, 1869, and made between *Margaret Lewis*, described as administratrix of the effects of *Walter Lewis* and *E. W. Lewis*, of the one part, and *James* of the other part. It contained recitals of some previous mortgages to *James*, and also the following recital: "And whereas parts of the buildings of the said farms have become dilapidated, and the said *Margaret Lewis* as such administratrix as aforesaid has no funds wherewith to repair and reinstate the same, and she

has applied to the said *C. H. James* to lend her £100 for the purpose of effecting such repairs on her charging the same on the entirety of such farms as such administratrix as aforesaid, as well as charging the same on her own shares, and he has agreed on those terms to make the advance." And the deed purported to charge the £100, with interest, accordingly on the entirety of the estates, and also on the shares of *Margaret Lewis* therein.

Glasse, Q.C., and *L. Field*, for the Plaintiffs.

Maclean, and *Upjohn*, for the Defendant *Margaret Lewis* and the mortgagee:—

A person to whom an administrator applies for a loan of money for the purpose of repairing leasehold property of the intestate, which he represents to be out of repair, is not bound to inquire whether the representation is true.

If the administrator repaired the property by means of his own moneys he would be entitled to a lien on the property for the amount which he thus expended.

[FRY, J.:—Ought not the administrator to ascertain from the beneficiaries whether they wish to have the property repaired? They might be improved out of their estate.]

At any rate the mortgagee has a good title. In order to deprive him of his security something like fraud must be shewn. He is *pro tanto* a purchaser for value: *Elliot* v. *Merryman* (1); *Corser* v. *Cartwright* (2).

[FRY, J.:—There the question arose upon a charge of debts on an estate by will. Here the question is whether an administrator has the power of mortgaging: *Russell* v. *Plaice* (3). An improper application of money is in the eye of the Court something very like fraud.]

Cruikshank v. *Duffin* (4).

Glasse, in reply:—

James acted throughout as the solicitor of Mrs. *Lewis*, and it must be presumed that he knew that she did not require the money

(1) Barn. (Chan.) 78.
(2) Law Rep. 7 H. L. 731.
(3) 18 Beav. 21.
(4) Law Rep. 13 Eq. 555.

FRY, J. 1882 RICKETTS v. LEWIS.

to pay debts of the intestate. He was bound to inquire what it was wanted for.

FRY, J., after referring to the deed of the 30th of June, 1869, and the recital in it above stated, continued :—

The question is whether there is a valid charge of the £100 on the entirety of the property. The deed was executed thirty-six years after the death of the intestate. That lapse of time raised the presumption that there were no debts of the intestate remaining unpaid, and, indeed, the mortgage deed itself raises the same presumption. What authority had the administratrix to raise money for the purpose of repairing the property? It may be that she was liable to repair by virtue of covenants in the lease, but having regard to the length of the terms and the time when they were granted that does not appear probable, and the *onus* of proving that there was such a liability is on the mortgagee, and he has not discharged it. It comes then, shortly, to this, that at the date of the mortgage Mrs. *Lewis* did not require the money for any purpose which it was her duty to perform as administratrix, and that she did require it for the purposes of her own beneficial enjoyment. This conclusion has not been rebutted by any evidence tendered by the mortgagee.

The Chief Clerk's certificate must be varied by disallowing the £100 as a charge on the entirety.

Solicitors for Plaintiffs: *Field, Roscoe, & Co.*, agents for *D. Thomas, Brecon.*

Solicitor for Defendants: *I. H. Wrentmore*, agent for *James & Co., Merthyr Tydvil.*

W. L. C.

HODGES *v.* HODGES.

FRY, J.
1882
April 3.

Married Woman—Separate Estate—Restraint on Anticipation—Removal by Court—Payment of Debts—Consent—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 39.

A married woman was entitled to the income of a fund in Court for her life, for her separate use without power of anticipation, with remainder in trust for her children, and in default of issue, in trust for such persons as she should, whether covert or sole, by will appoint, and, in default of appointment, to herself absolutely. She having had no children, and being past the age of childbearing, and having contracted a number of debts, for payment of which the creditors were pressing her and causing her great annoyance, she with her husband applied to the Court to exercise its power under sect. 39 of the *Conveyancing Act*, 1881, to remove the restraint on anticipation, and to order part of the fund to be paid out to her to enable her to pay her debts:—

Held, that, whether she did or did not exercise her power of appointment, the fund would at her death be subject to the payment of her debts, and that under the circumstances the restraint on anticipation ought to be removed, and a portion of the fund paid out to the applicant.

In re Harvey's Estate (1) followed.

The order was made upon the evidence of the married woman's consent afforded by an affidavit made by her in support of the application, and a letter written by her to her solicitors, strongly urging them to obtain the money for her.

But, *quære*, whether such an order ought in general to be made without ascertaining the consent of the married woman by a separate examination in the ordinary way.

ADJOURNED SUMMONS.

B. G. Hodges, by his will, dated the 3rd of June, 1843, bequeathed the residue of his estate to trustees, on trust for all his children (except his eldest daughter *Eliza Hodges*) who should be living at his decease or born in due time afterwards, in the shares therein mentioned, the shares of each of his younger daughters to vest on their respectively attaining the age of twenty-one years, or being married under that age, with such consent as therein mentioned. And he directed that his trustees should stand possessed of the legacy or share of each of his younger daughters, upon trust to pay the annual proceeds thereof into her own hands during her life, for her separate use, without power of anticipation,

(1) 13 Ch. D. 216.

FRY, J.
1882
HODGES
v.
HODGES.

as a personal, separate, and inalienable provision. And after the death of such respective daughters, then as to her said share and the annual produce thereof, upon certain trusts for the benefit of her children and issue. And in case any or either of the testator's younger daughters should die without having any child or children who should become an object or objects of the last-mentioned trust, then, as to the share and shares of such daughter or daughters so dying and the annual produce thereof, in trust for such person or persons, and in such manner as such daughter or daughters respectively, whether covert or sole, should by will direct or appoint, and in default of such direction or appointment, in trust for such daughter or daughters respectively, to and for her and their own absolute use and benefit. The testator died on the 31st of October, 1843, leaving two younger daughters, *Caroline Hodges* and *Rosina Hodges*, surviving him. This suit was instituted in the Court of Chancery in January, 1845, to establish the trusts of the testator's will, and to administer his estate, and on the 20th of January, 1845, an administration decree was made. In this suit the share of the daughter *Caroline Hodges* was invested and carried over to a separate account intituled, "The account of the Plaintiff *Caroline Hodges* and others in succession." On the 17th of March, 1874, *Caroline Hodges* married *Augustin Martin Chartrie*, a Frenchman domiciled and residing in *France*.

On the 21st of February, 1882, Madame *Chartrie*, by a next friend, and her husband took out a summons, asking that, notwithstanding the restraint on anticipation imposed by the will of the testator, an order might be made, pursuant to sect. 39 of the *Conveyancing and Law of Property Act*, 1881, that £955, part of a sum of £6955 India 4 per Cent. Stock, standing in Court to the credit of the above-mentioned account, might be sold, and the proceeds of sale paid to Madame *Chartrie* on her separate receipt, and that the dividends from time to time to accrue on the residue of the stock might be paid to her on her separate receipt during her life, or until further order. An affidavit was made by M. *Chartrie* that a settlement or *contrat de mariage* in the French form was executed on the marriage of himself and his wife in *France*, where both he and his wife then were, and where they still were domiciled, but that this settlement did not in any way affect the funds

standing to the credit of the above account, and that no settlement or agreement for a settlement affecting the same funds, or any part thereof, had ever been made. He said also that there had never been any issue of the marriage.

The wife deposed that she was fifty-five years of age, and that, owing to various causes, she had during several years past been gradually contracting debts among tradespeople and others in the neighbourhood in excess of her means of payment, and that she was then indebted to the extent of several hundreds of pounds, and was being much harassed by her creditors, who, knowing that she was entitled to a large sum in the Court of Chancery in *England*, were causing her very great annoyance and trouble by their importunity.

There was in evidence also a letter from Madame *Chartrie* to the solicitors who had issued the summons, in which she urged them in very strong terms to obtain for her the money for which the summons asked. The summons was not served on any one.

Glasse, Q.C., and *Ingle Joyce*, for the summons:—

Sect. 39 (1) of *The Conveyancing and Law of Property Act*, 1881, gives the Court power to remove the restraint on anticipation.

[FRY, J.:—What will be the benefit to the married woman, except the receipt of the money.]

Relieving her from her debts, and from being harassed by her creditors. The restraint on anticipation is only an addition in equity to separate use. It ceases when coverture ceases. Under the French law the applicant is capable of receiving the money. If she makes an appointment by will, the fund will go to the appointee subject to the payment of her debts: *London Chartered Bank of Australia* v. *Lempriere* (2).

[FRY, J.:—If she appointed to *A. B.*, must *A. B.* pay out of the fund all her so-called debts, without reference to the question whether they were contracted on the faith of it?]

(1) Sect. 39 provides that "Notwithstanding that a married woman is restrained from anticipation, the Court may, if it thinks fit, where it appears to the Court to be for her benefit, by judgment or order, with her consent, bind her interest in any property."

(2) Law Rep. 4 P. C. 572.

FRY, J.
1882
HODGES
v.
HODGES.

In re Harvey's Estate (1) shews that he must. The applicant will be assumed to be past the age of childbearing: *Davidson* v. *Kimpton* (2). She is, therefore, subject to the restraint on anticipation, in effect the absolute owner of the fund. Her next of kin have no equity. It is not necessary for her to execute an appointment: *Holloway* v. *Clarkson* (3); *Heatley* v. *Thomas* (4).

[FRY, J.:—Sect 39 requires that her consent should be given; how is that consent to be evidenced?]

Her affidavit is enough. But this is in fact her urgent application, as her letter to her solicitors shews.

No one appeared in opposition.

FRY, J.:—

Two points arise for decision. The first question is whether I ought, in the exercise of the power given to me by sect. 39, to direct payment out of Court of £955 to be made to this lady, notwithstanding the restraint on anticipation which has been imposed by the testator, in other words, whether I ought to release her from the fetter imposed by the will. It appears that she has contracted debts to a considerable amount, and that these debts, and the pressure of the creditors for payment, harass her and are a source of great annoyance to her. Under these circumstances I am prepared to hold that the application ought to be granted and that the restraint on anticipation ought to be removed.

The next question is, whether supposing that restraint to be removed, the portion of capital which is asked for ought to be paid out to the applicant. [His Lordship stated the limitations of the will.] She has had no child, and she is now past the age of childbearing. Subject to the interest given by the will to her children (if any), the fund is to go to such persons as she shall by will appoint, and in default of appointment in trust for herself absolutely. According to the decision of Vice-Chancellor *Hall* in *In re Harvey's Estate*, she could not make an appointment by

(1) 13 Ch. D. 216.
(2) 18 Ch. D. 213.
(3) 2 Hare, 521.
(4) 15 Ves. 596.

will, except subject to the payment of the debts which she has contracted on the faith of her separate estate, and if she should make no appointment, it is equally clear that her executors would take the fund subject to the payment of her debts. Subject therefore, to her life interest, the fund goes, *quâcunque viâ*, subject to the payment of her debts. I think, therefore, I may do what is asked.

I have felt some doubt whether I ought not to require the applicant's consent to be given in the ordinary formal way by a separate examination. I have, however, been informed that in other branches of the Court this formal consent has not been required, and therefore I shall not require it on the present occasion. At the same time I think it is well worthy of consideration whether a separate examination of the married woman ought not to be required in such cases, for I think there is great danger of applications of this kind being made of which the married woman may know nothing. In the present case I have evidence which satisfies me of the wish of the lady herself, and therefore I make the order asked for.

Solicitors: *Harting, Son, & Ellis.*

W. L. C.

MORLEY *v.* CLIFFORD.

[1881 M. 2522.]

Common—Appurtenant—Copyhold—Prescription Act (2 & 3 *Will.* 4, *c.* 71), *s.* 1 [*Revised Ed. Statutes, vol. vii. p.* 223]—*Cattle levant and couchant.*

A copyholder cannot lawfully claim common appurtenant without stint in respect of his copyhold tenement, but such common must be limited to the cattle levant and couchant on the tenement to which it is annexed, or the number must be ascertained by the court rolls or in some other manner.

THIS was an action by the clerk to the Conservators of *Barnes Common* for an injunction to restrain the Defendant, a copyholder of *Barnes Manor*, from turning out cattle and geese on the common. The Conservators were authorized by local Acts of Parliament to frame by-laws to prevent unauthorized persons from turning out

FRY, J.
1882
MORLEY
v.
CLIFFORD.

cattle, sheep, or other animals on the common, and to sue in the name of their clerk for any matter relating to the execution of their powers.

By-laws were accordingly issued to restrain unauthorized persons from turning out such cattle or animals, and this action was instituted in pursuance of the said local Acts and the by-laws, stating that the Defendant claimed a right to turn out cattle and other animals on the common, but that he had no authority from the Conservators and no legal right so to do.

The Defendant, by his pleadings, stated that he had occupied five acres of copyhold land called *Jews Close* and some copyhold houses of *Barnes Manor* for forty years, and claimed that he had a right to turn out and depasture on the common all the cattle and geese which he kept on about one acre of freehold land which was occupied by him as lessee in the parish of *Barnes*, or so many as he might think fit. By his pleadings he founded his claims, firstly, on his privilege as a ratepayer in the parish; secondly, on his right of common appurtenant to the copyhold land and tenements held by him in the parish; and, thirdly, on prescription; but in the course of the argument the first and third claims were abandoned, and the Defendant's claim was based on his rights as a copyholder only.

The court rolls were in evidence, and shewed that from time to time, and in particular in the fourteenth year of *Henry* VII., limits had been placed upon the number of animals which could be depastured on the common in respect of the copyhold tenements of the manor, allowing six beasts for every twenty acres, and so in proportion, but the Defendant contended that such limitations were invalid, and that he had a right of common of cattle and other animals not limited in number in respect of his holding.

W. W. Karslake, Q.C., and *Dryden*, for the Plaintiff:—

Geese, at any rate, are not commonable animals: 4 *Vin.* Abr. (1), and a right to depasture them cannot be in accordance with any legal custom of the manor. There can be no right of common without stint in a copyholder: *Mellor* v. *Spateman* (2). The right must be limited by the number of cattle which can be

(1) 2nd Ed. p. 582.

(2) 1 Wm. Saund. 343.

levant and couchant in *Jews Close*: *Benson* v. *Chester* (1); *Scholes* v. *Hargreaves* (2); *Bennett* v. *Reeve* (3). Prescription for a common not according to Common Law is of no avail: *Bailey* v. *Stephens* (4); *Earl de la Warr* v. *Miles* (5).

J. Pearson, Q.C., and *Buck*, for the Defendant:—

The claim to turn out geese is not necessarily illegal: *Williams* on Rights of Common (6): it may have had a lawful origin.

The Defendant has an unlimited right of common appurtenant to his copyhold tenement, and has used such right without hindrance.

If any limit has been imposed in the case of particular copyholders, that does not bind the Defendant: *Chapman* v. *Cowlan* (7).

[FRY, J., referred to *Duke of Portland* v. *Hill* (8).]

The acts proved ought to be referred to a legal origin if they are consistent with any such origin: *Carr* v. *Lambert* (9). The common claimed is not inconsistent with a Common Law origin, and so the *Prescription Act* applies: *Earl de la Warr* v. *Miles*.

W. W. Karslake, in reply:—

A claim for common without stint cannot have a legal origin, but must be limited to cattle levant and couchant on the commoner's own land: *Stevens* v. *Austin* (10); *Williams* on Rights of Common (11); *Cruise's* Digest (12).

[FRY, J., referred to *Rolle's* Abridgement (13).]

Chapman v. *Cowlan*. A prescription to be good must be both reasonable and certain: *Attorney-General* v. *Mathias* (14). The fact that a thing has been actually done for a long time is not enough: *Duke of Portland* v. *Hill*.

(1) 8 T. R. 396.
(2) 5 T. R. 46.
(3) Willes, 227.
(4) 12 C. B. (N.S.) 91.
(5) 17 Ch. D. 535.
(6) Page 168.
(7) 13 East, 10.
(8) Law Rep. 2 Eq. 765.
(9) Law Rep. 1 Ex. 168.
(10) 2 Mod. 185.
(11) Pages 31 *et seq.*
(12) White's Ed., vol. iii. p. 67.
(13) Vol. i. p. 398.
(14) 4 K. & J. 579.

FRY, J.
1882
MORLEY
v.
CLIFFORD.

April 4. FRY, J.:—

This is an action brought by the clerk of the Conservators of *Barnes Common* against the Defendant, asking for a declaration with regard to the claim by the Defendant of the right to turn out cows and geese on *Barnes Common*.

The Defendant pleaded that he was entitled to common, first, as a resident ratepayer of the parish; secondly, as a copyholder of the manor of *Barnes*, and the occupier of copyhold lands held of the manor; and, thirdly, by reason of his having turned out and depastured his horses, cattle, and geese on the said common during forty years and upwards now last past.

The claim in respect of being a ratepayer has been abandoned, and the third claim, by reason of his having turned out for forty years, which is a claim to common in gross, is also abandoned, and the only question therefore is as to the Defendant's right as a copyholder of the manor of *Barnes*.

The copyhold land of which the Defendant is occupier consists of some five or six acres of land known as *Jews Close*, the greater part of which is occupied as a market garden, but some part of which, according to the evidence of the Defendant, is occupied for the growing of products which may be consumed by the cows which the Defendant has kept on certain freehold tenements of which he is lessee.

That is the position of the Defendant with regard to the property of which he is the owner. He does not claim any right of common in respect of his freehold land, and therefore the case has narrowed itself down on the part of the Defendant to a claim of common in respect of the five or six acres of copyhold land known as *Jews Close*.

[His Lordship held, that on the evidence the Defendant had not shewn any connection between the geese and the copyhold, and that his claim to put geese on the common failed, and continued:—] The next head of inquiry is with regard to the Defendant's right to put an unlimited number of cattle upon the common. That is the way in which he has stated his claim of right at the Bar. The 1st section of the *Prescription Act* enacts that "No claim which may lawfully be made at the Common Law shall be defeated" in a certain manner. The section therefore

only relates to a claim which at Common Law can be lawfully made, and the Plaintiff's counsel says that no claim could be lawfully made at Common Law to common appurtenant without stint in any manor; that is to say, it must be either subject to the rule of levancy and couchancy, or the number must be ascertained in some other manner. The law is laid down in *Cruise's* Digest in the passage which has been cited to me by Mr. *Karslake*. "Common appurtenant may be for cattle without number, or for a certain number only; and may be appurtenant to a manor by prescription, or by grant, made since time of memory; and that as well for a certain number of cattle, as without number: where it is without number, it is restrained to cattle levant and couchant on the land to which it is annexed." That proposition is entirely borne out by the reference which is made in *Cruise's* Digest to the first volume of *Rolle's* Abridgement, which contains the passage which I referred to during the course of the discussion. "Therefore," the learned author of the Digest proceeds, "if a person claims common by prescription on the land of another, for all manner of commonable cattle as belonging to a tenement this is a void prescription, because he does not say that it is for cattle levant and couchant." Another observation which arises is this: the Defendant is claiming as a copyholder, and he can only claim according to the custom of the manor. Now when the custom of the manor is investigated it is found that at a Court held as long ago as the 14 Hen. 7, a certain limit was put upon the number of cattle to be placed upon the common by the various commoners. It appears to me that probably the effect of that was to reduce levancy and couchancy to a defined number, but that is an immaterial inquiry, because, as I have said, the Defendant must accept either that limit or the limit of levancy and couchancy, and in neither case would he be entitled to turn on without limit. That claim, therefore, of the Defendant appears to me to fail.

[His Lordship then decided certain questions not material to this report, and made the following declaration:—]

Declare that the Defendant so long as he shall continue to be the occupier of the copyhold piece of land known as *Jews Close*, and now used as market garden

FRY, J.
1882
MORLEY
v.
CLIFFORD.

ground, by virtue of such occupancy and according to the custom of the manor, may turn out two cows or two oxen, or one cow and one ox, and one horse or mare, and no more, but no other animal.

Solicitors for Plaintiff: *Morley & Shirreff.*
Solicitors for Defendant: *Woodbridge & Sons.*

C. W. C.

FRY, J.
1882
April 21, 28.

In re COUNT D'EPINEUIL (2). TADMAN *v.* D'EPINEUIL.

[1881 D. 24.]

Bill of Sale—Charge of all Personalty—After-acquired Property.

A person by a written instrument charged "all his present and future personalty" to secure to the Plaintiff any sums he might become indebted to him, and afterwards incurred debts to the Plaintiff:—

Held, that this instrument operated to charge all the personal property belonging to the debtor at the date of the instrument, but did not operate to charge after-acquired property.

Holroyd v. *Marshall* (1) distinguished.

THIS was an adjourned summons in an administration action, and the only question for decision was the validity and effect, as a charge, of the following documents.

On the 7th of October, 1881, a letter was written and signed by the Countess *D'Epineuil*, in these terms:—

"Dear Mr. *Tadman*,

"I charge in your favour all my appointed interest under the will of dame *Mary O'Connell* to secure payment to you of a sum not exceeding £200. "Yours truly,

"*G. D'Epineuil.*"

On the same date the Count *D'Epineuil* signed a memorandum as follows:—

"I hereby approve and authorize the above charge made on her appointed interest under the will of dame *Mary O'Connell* by the Countess *D'Epineuil*, my wife, in favour of Mr. *Tadman*. I furthermore charge in his favour all my present and future per-

(1) 10 H. L. C. 191.

sonalty to secure to him any sum or sums I may be indebted to him at the time he may choose to make use of the above charge."

It was admitted that the estate of Count *D'Epineuil* was indebted to the Plaintiff, *Tadman*, in the sum of £228, and the question was whether this was a secured debt or not.

George Henderson, for the Plaintiff.

Fairbairn, for the Defendant:—

This charge, including all the personal property of the mortgagor present and future, cannot be valid. The mortgagee would have the right to prevent the mortgagor from the use of any of his property, and the Court could not restrain him from making a harsh use of this power except by declaring the charge invalid. No doubt a railway can charge its whole undertaking, but that means the fruits of the undertaking only.

April 28. FRY, J.:—

This case was postponed, as I believed there was authority bearing upon the point. It appears to me that *Belding* v. *Read* (1) is such an authority. There a person assigned all his personal estate and effects then being or thereafter to be in a certain farm or elsewhere in *Great Britain* to a creditor upon trust to sell and satisfy the debt, and the question arose between his assignees in bankruptcy and the creditor, who entered and sold one day before the bankruptcy, as to the validity of the charge. The Court of Exchequer held the charge good as to the property of the assignor at the date of the execution of the deed, but bad as to after-acquired property. It was admitted that at Common Law the debtor could not charge property which he might afterwards acquire, but it was suggested that the deed would create a contract which in Equity would bind the after-acquired property from the moment of its acquisition; but the Court decided that the creditor could not seize goods acquired after the bill of sale was executed, and Baron *Martin* said that the reason (clearly stated by the Lord Chancellor in *Holroyd* v. *Marshall* (2))

(1) 3 H. & C. 955. (2) 10 H. L. C. 191.

FRY, J.
1882
In re COUNT D'EPINEUIL (2).
TADMAN *v.* D'EPINEUIL.

was that the equitable title to goods as well as to land was confined to specific goods, and did not extend to goods which were undetermined.

I shall hold, therefore, in this case that only the goods which belonged to Count *D'Epineuil* on the 7th of October, 1881, the date of the latter memorandum, were comprised in the charge. There are many reasons why such a charge as this should not be operative as regards undefined property not belonging to the mortgagor at the date of the execution of the deed; it would interfere with his power of maintaining himself. But the invalidity of the charge as to part of the property included in its terms does not, in my opinion, interfere with its validity as to the rest.

Solicitors: *W. H. Armstrong*; *S. G. Warner.*

C. W. C.

FRY, J.
1882
May 19, 20.

In re BOYSE.
CROFTON *v.* CROFTON.

[1880 B. 128.]

Evidence—Witness resident Abroad—Commission to Foreign Court—Rules of Court, 1875, *Order* XXXVII., *r.* 4.

Upon an application for a commission to take the evidence of a witness who is abroad, the Court ought to be satisfied that the application is made *bonâ fide*, and that the claim in support of which the evidence is desired is one which the Court ought to try, but it ought not to go any further into the merits of the claim.

In a case in which a claim was made under very suspicious circumstances, and the Court was of opinion that a person resident abroad, whose evidence was desired in support of it, ought to be subjected to a drastic cross-examination:—

Held, that a commission ought not to be issued to a foreign Court for the examination of the witness abroad, because it appeared that under the procedure of that Court he would not be cross-examined in the ordinary way.

ADJOURNED SUMMONS.

This action was brought for the administration of the estate of *Jane Stratford Boyse*, a widow, who died intestate in *France* on

the 1st of May, 1878. She had lived there with one *Michel Auguste Gautier* as his wife, but had not been married to him. The intestate was possessed of a large amount of Consols and New 3 per cent. Annuities, which were registered in her name in the books of the *Bank of England*, and the dividends thereon, to an amount exceeding £20,000, had been for some years before her death unclaimed by her.

M. *Phillippe Canonge* claimed to prove against the estate for a large sum under the following circumstances. On the 16th of August, 1872, Mrs. *Boyse* signed the following document:—

"Good for £7000.

"At sight *Marseilles*.

"By this single and present letter of exchange please pay to my order the sum of £7000 sterling, which sum is on account on the dividends and interests due on the capital and dividends registered in the books of the Governor and the *Bank of England & Co.*, in the name of *Colclough* and *Boyse*, which you will please charge to my account and credit according to a registered letter I have addressed to you."

The document was addressed to the Governor & Co. of the *Bank of England*. A penny Inland Revenue stamp was affixed to it and was cancelled. It was indorsed by Mrs. *Boyse*, under the date of the 21st of April, 1873, "Pay to the order of M. *Gautier* value in cash." And under the date of the 10th of August, 1876, it was indorsed by M. *Gautier*, "*Payez à l'ordre de M. Canonge, père, value en compte pour avances.*" On the 18th of October, 1878, M. *Gautier* signed another document in the French language, by which he acknowledged that he was indebted to *Canonge* in the sum of 20,200 francs for loans and advances, &c., and as balance of all accounts to this date, "which sum is to be paid him out of the amount of the bill for £7000 sterling which I have indorsed to his order; he is to retain the same at the time of cashing the said bill, or on the occasion of negociating, and will be discharged towards me in respect of that amount."

Canonge claimed to prove against the estate of the intestate for the sum of £7000 and interest thereon, founding his claim on the document of the 16th of August, 1872, which in his affidavit he

FRY, J.
1882
In re BOYSE.
CROFTON *v.* CROFTON.

described as a bill of exchange. And he said that the sum of £7000 was due to him partly on his own account, and partly as trustee for other persons, creditors of *Gautier*, under circumstances which he stated, the ultimate surplus being payable to *Gautier*.

On the 23rd of February, 1882, a summons was issued on behalf of *Canonge*, asking that a writ of commission might issue on his behalf, directed to the President of the Civil Tribunal of the Department of the *Seine* in *Paris*, and the Judges thereof, for the examination of *Gautier* as a witness on behalf of the applicant. The summons was supported by an affidavit made by the solicitor of the applicant, who stated that he believed that *Gautier* was a material and necessary witness for the prosecution of the claim of *Canonge* in the action, and that he could not safely proceed to the hearing of his application to rank as a creditor of the intestate without the evidence of *Gautier*. *Gautier* was residing in *Paris*, and the solicitor had applied to him to make an affidavit in support of the claim of *Canonge*, but he had refused to do so. The solicitor said that he had asked *Gautier* whether he would voluntarily appear before an English Commissioner authorized by an order of the Court to examine him, and he had replied in the negative. *Gautier* had however lately intimated that, if a commission were issued, directed to the Civil Tribunal of the Department of the *Seine*, he would attend before a Judge of that tribunal to be examined.

An affidavit was made by M. *Dillais*, an *avoué* of the Civil Tribunal of first instance of the *Seine*, in which he said:

"When a commission to examine witnesses is issued by a foreign Court to a French Court, the following is the *modus operandi*. The foreign decision is transmitted through the diplomatic channel to the Ministry of Justice in *France*. It is next sent by the ministry to the tribunal of the witness's domicil. At the instance of the Procurator of the Republic the tribunal delivers a judgment, appointing a Judge to take the deposition of the witness. The witness is cited for the day fixed by the Judge. The parties interested are not cited by the Procurator of the Republic; they are, however, permitted to be present at the execution of the commission, either personally or by *avoué*. It is to be observed that if the law of the country whence ema-

nates the commission for the examination of witnesses requires the presence of the parties on the examination of the witness, it would be necessary, independently of the formalities adopted at the office of the Procurator of the Republic, that the parties should be cited in accordance with the law of such country.

"When a French Judge executes a commission for the examination of witnesses under such circumstances, the mode of proceeding is directed by him. If the questions to be asked of the witness are determined by the commission, such questions are put by the Judge, and he refuses generally to put any others, in order not to go beyond the limits of the commission confided to him. If, on the contrary, the commission restricts itself to stating the facts upon which the witness is to be examined, without determining the questions to be put to him, a greater latitude is left to the Judge, and he can both put the questions which appear to him proper, and allow the parties present or their *avoués* to have put to the witness the questions which they may consider necessary, but such questions will always be addressed to the witness through the medium of the Judge. The English counsel or solicitors of the parties would not be entitled to represent their clients before the French Judge.

"In the event of the terms of the commission appearing to authorize the parties to put questions through the medium of the Judge, the Judge would interrogate the witness in the terms used by the *avoué*. The answers of the witness would be dictated by the Judge to his Registrar. It might be anticipated that the Judge would exercise a discretion as to permitting or not permitting to be put questions which he might consider unnecessary or superabundant, or in permitting or not permitting the same questions to be repeated several times. The depositions would be taken, and the *procés verbal* made in the French form and language. If it were requisite, recourse would be had to a sworn interpreter.

"The execution of such a commission is not regulated by any provision of the French law, and in consequence I can only state the usual practice in such cases, and give an opinion appearing to me to be in accordance with the spirit of the French law."

FRY, J.
1882
In re BOYSE.
CROFTON *v.* CROFTON.

Cookson, Q.C., and *Northmore Lawrence*, for the summons:—

This is a case within rule 4 of Order XXXVII., and it is "necessary for the purposes of justice" that the commission should issue. *Gautier* is a material witness, indeed his evidence is essential to the proof of the claim, and the only way of obtaining his evidence is by means of a commission directed to the French Court. He cannot be compelled to come to this country or to give evidence in any other way. A commission to the French Court should be issued, as was done in *Imperial Land Company of Marseilles* v. *Masterman*; *Seton* on Decrees (1). The form of order was then settled by the Court of Appeal, and this was followed by the Court of Appeal in the subsequent case of *In re Imperial Land Company of Marseilles* (2).

Glasse, Q.C., and *Hadley*, for the administrator:—

In *In re Imperial Land Company of Marseilles* the Court of Appeal were of opinion that the application was made *bonâ fide*. In an unreported case of *Berdan* v. *Greenwood* (3), on the other

(1) 4th Ed. pp. 21, 149, 1638.
(2) 37 L. T. (N.S.) 588.

(3) C. A. Feb. 7, 1880.

BERDAN *v.* GREENWOOD.

THIS action was brought by General *Berdan*, a citizen of the *United States of America*, who was the inventor of a rifle called the *Berdan* rifle. By his statement of claim he alleged that in the year 1869 he was in *Russia* and in communication with the Russian Government respecting the manufacture of his guns and rifles, and that the Defendants' firm were endeavouring to obtain from the same Government orders for machines necessary for the making of the guns and rifles, and that, in consideration of the Plaintiff's agreeing to use his influence with the Government to prevent an order being given to any other parties for machines to make his guns in *Tula* until a commission should visit *England*, the Defendants' firm agreed to pay the Plaintiff a commission of 5 per cent. on all orders received through him or directly from the Russian Government for such machines for three years from the date of the agreement. It was alleged that the Defendants had received and executed such orders to a large amount, and that the Plaintiff had performed his part of the agreement so as to entitle him to the agreed commission, and the Plaintiff claimed upwards of £5000. The Defendants disputed the Plaintiff's claim on various grounds, one of which was that he had never used his influence with the Russian Government. The Plaintiff applied to the Exchequer Division for the issue of a commission to take his evidence at *Bucharest*, where he was residing. The ground of the application was that he was suffering from fatty degeneration of the heart, which would render a sea voyage

hand, the Court of Appeal rescinded an order which had been made by the Exchequer Division for the issue of a commission

perilous to him. The application was granted by the Exchequer Division.

The Defendants appealed.

Herschell, Q.C., and *R. Vaughan Williams*, for the Appellants.

Mellor, Q.C., and *Shortt*, for the Plaintiff.

BAGGALLAY, L.J.:—

This case comes before us by way of appeal from an order of the Exchequer Division affirming an order made by Mr. Justice *Stephen* in Chambers directing a commission to issue for the examination abroad of the Plaintiff. The Master, before whom the matter originally came, refused the application. Mr. Justice *Stephen* in Chambers thought that it ought to be granted, and made the order, and the Divisional Court (*Kelly*, C.B., and *Pollock*, B.) affirmed his decision. From that decision the present appeal is brought.

Now under the *Judicature Act* the circumstances under which a commission for the examination of a witness abroad should issue are pointed out by the 4th rule of the 37th Order. That rule provides that "the Court or a Judge may, in any cause or matter where it shall appear necessary for the purposes of justice, make any order for the examination upon oath before any officer of the Court, or any other person or persons, and at any place, of any witness or person." What, therefore, the Court or the Judge is called upon to consider is whether it appears necessary for the purposes of justice that the commission should be issued. Of course "for the purposes of justice" does not mean in the interest of either party to the litigation, but in the interest of all the parties to the litigation.

Now in the present case the application is made upon the ground that the Plaintiff is suffering from a disease of the heart, commonly known as fatty degeneration; that crossing over the water from *France* to *England* might produce sea sickness, which would be productive of danger to his life, that any violent vomiting might cause fainting or syncope from the state of his heart, and that this, if produced, might or probably would end in death. Of course, if that was the only question to be considered, and the evidence shewed such a state of circumstances to exist, it could hardly be said that justice would require that the plaintiff should be compelled to come over to *England* at the risk of his life to give evidence in support of his case. At any rate there would be a *primâ facie* case in his favour that, instead of coming over to this country, he should give his evidence before a commission. But we must regard the interests of justice, the interest of the Defendants as well as that of the Plaintiff, and of course we must consider the nature of the issues which are raised in the pleadings. [His Lordship stated the nature of the Plaintiff's claim, and continued]:—

Now certainly the character of the services alleged to have been rendered by the Plaintiff in respect of which a commission is claimed suggests very considerable doubt whether those particular services have been rendered and how. One can well imagine the extreme importance to the Defendants in a case of this kind of having the fullest opportunity of thoroughly investigating the claim, and testing by cross-examination the witnesses who are called to

FRY, J.
1882
In re BOYSE.
CROFTON *v.* CROFTON.

for the examination of the Plaintiff abroad as a witness on his own behalf, on the ground that he ought to be cross-examined in

---

prove that the alleged services were rendered. Nor can I leave altogether out of consideration this fact, that when the Plaintiff claims commission from the Defendants on the footing of services having been rendered, *primâ facie* one would expect that the persons through whom those services had been rendered would be called to prove that they had been rendered, rather than that the Plaintiff himself should say, "I induced those particular persons to represent the great advantage of my rifles and to procure their purchase." The Plaintiff rests his present application upon this, that his own evidence is essential or of great materiality to the establishment of his case upon the trial. As I have said, the fact that the case is to be supported mainly by the Plaintiff's own evidence, when it appears so very probable that other witnesses could be called to establish it, makes it still more important that the Defendants should have an opportunity of fully cross-examining the Plaintiff's witnesses before the tribunal which is to decide the case.

I am very unwilling to express any opinion upon the question which has been so much argued, the credibility of General *Berdan*, but, in considering whether the examination of a witness should be taken by commission, we must have regard, at any rate, to the possibility of his not being a credible witness. If the witness is a credible witness it is hardly material whether he gives his evidence *vivâ voce* in Court or before a commission, or by affidavit, or in any other form. But we must assume the possibility of his not being a credible witness, and then it becomes of the most extreme importance that the jury, or the Court which has to decide the question, should have the opportunity of seeing the demeanour of the witness, and observing the way in which the various questions which are put to him in cross-examination are answered. Now it has been suggested that the questions for the cross-examination of the Plaintiff (assuming that the commission is to issue) have been put in a form which do not indicate any very searching inquiry, or anything as to which there might be any great advantage in his giving his answers before the jury rather than before the commissioners, who would report the effect of the answers. But it must be borne in mind that when cross-examinations of this sort are made, the answer to one question is suggestive of other questions, and unless the whole body of legal advisers of the Defendants are to go over and attend the commission, so that they may be prepared to meet any possible emergency which may arise in the course of the cross-examination, it does not appear to me that there would be the same facilities of cross-examination before the commission as there would be if the witness were here giving his evidence in Court. Now I have already said that a *primâ facie* case would be made out for the commission, if it was clear that the witness could not possibly attend here except at the risk of his life, because then the refusal of a commission would practically prevent his giving his evidence at all. I am bound to say that would be a very strong argument in favour of granting a commission. But, as I have already pointed out, this case ought not to depend simply and solely on the evidence of this one witness. And I think that, even in the extreme case where the refusal of a commission might pre-

this country, and that he had not proved the truth of his allegation that he could not cross the channel without danger to his life.

vent the evidence of the witness from being given at all, yet, if the Court was satisfied that the non-attendance of the witness before the tribunal which had to decide the case would lead to injustice to the Defendant, the commission still ought to be refused. I do not, however, so regard the evidence in the present case. [His Lordship reviewed the evidence as to the Plaintiff's state of health, and continued :—]

Under these circumstances I feel very great difficulty in this case, because I cannot help feeling the force of the remark of the Lord Chief Baron, that he was unwilling to compel a man either to come over here at the risk of his life, or to abandon giving his evidence. On the other hand, I feel bound, as a member of the Court which has to exercise the discretion of saying whether it appears necessary for the purposes of justice that the commission should be issued, to say that I think justice would be or might be defeated if the commission was allowed to issue.

I have only one other remark to make. It was said by Mr. *Mellor* and Mr. *Shortt* that the matter is one purely for the discretion of the Court or the Judge to whom the application is made, and that the exercise of that discretion should not be interfered with by the Court of Appeal. In a sense, no doubt, it is a matter of discretion, and so it is in almost every case in which a Judge is called upon to give his decision. He must weigh all the circumstances of the case, and come to a conclusion upon them. But then being in that sense only a discretion, the exercise of it is clearly the subject of review. I regret that I feel compelled to take a view differing from that of the three Judges in the Court below, but I am bound to act according to that which I believe to be the correct view of the case. In my opinion, this appeal must be allowed, and the order for the commission must be discharged.

COTTON, L.J. :—

What we have to consider is this, whether it appears to us necessary for the purposes of justice that the evidence of the Plaintiff should be taken by a commission in *France*.

I will first deal with the argument that we ought not to interfere with the decision of the Court below, because it is a matter for their discretion and they have exercised their discretion. I am always most unwilling to interfere in a matter which is really within the discretion of the Court appealed from, and the exercise of their discretion is appealed from. It is impossible to lay down any absolute limit as to the cases in which the Court of Appeal will interfere when there is a discretion, but as a general rule the Court will not interfere unless a wrong principle has been applied in exercising that discretion or there has evidently been some serious miscarriage. But the present case is not one of discretion within the meaning of that rule. The Court, on the evidence before it, has to arrive at the conclusion whether it is or is not necessary for the purposes of justice that the ordinary mode in which evidence is to be taken should be departed from, and unless the Court does arrive at the conclusion that it is necessary, it is the right of the person who opposes the examination in the way proposed, to have the evidence taken in the usual way. If the Court does arrive at that

FRY, J.
1882
In re BOYSE.
CROFTON *v.* CROFTON.

The Court has a discretion in the matter. The present claim is made under very suspicious circumstances, and the witness

conclusion it is the right of the party applying for the commission to have it. It is not a matter of discretion in the sense in which that word has been used in the argument before us; it is entirely different. We have to answer the question, Is it necessary for the purposes of justice that the ordinary way of taking evidence should be departed from?

Now, at first I doubted whether it could be said that for the purposes of the Plaintiff his own evidence was required, because his claim seems to rest on a contract contained in two letters; but, when it appears what the defence is, no doubt it may be useful for him to give evidence for the purpose of shewing that he did in fact do that which was the consideration for the contract, namely, use his influence to induce the Russian Government to order rifles from the Defendants. Therefore, his evidence is certainly material. But it is not the only evidence which could be adduced on that point, and, as I understand, an order has been obtained by the Defendants (curiously enough it was objected to by the Plaintiff) for the examination by commission of some witnesess who cannot be compelled to come here, viz., the persons with whom the Plaintiff says he used his influence. That is the only way of getting the evidence of those persons. This, coupled with what has been said by Lord Justice *Baggallay*, in which I quite agree, shews that on the point in question the Plaintiff's evidence is not the only evidence.

But we ought to consider not merely what the Plaintiff's case requires, but what justice to the Defendant as well as to the Plaintiff requires. And in such a case as this it is, in my opinion, eminently important that the demeanour of the witness should be seen and his precise answers to the questions put to him should be heard by the Judge, or the Judge and jury, who have to decide the case, and that the Defendants should have the fullest opportunity of cross-examining him, they being really only able to do that effectually when the witness is in Court, and his demeanour, and the way in which he answers the questions, can be judged of by the Judge and by the jury.

Now, in my opinion, in order to establish a case for examination by commission it is not necessary to prove that, in all human probability, the bringing of the Plaintiff over here will cause his death. But I think the Plaintiff must make out that, from circumstances peculiar to his state of health, there will be a serious risk in requiring him to come here, and that must be established if we are to consider that his evidence is the only evidence which can be given on the point. I am dealing with the case from henceforth as if the Plaintiff's was the only evidence which could be given on his behalf. Can we then arrive at the conclusion that there is that serious risk? In the first place, I think we must, for the purpose of the present application, entirely reject any evidence which has been given by the Plaintiff himself, and for this reason: in an affidavit which he made upon the application to Mr. Justice *Stephen*, there were statements which, if they were not absolutely untrue, were made in such a way as absolutely to mislead the Court as to the question which they had to decide. [His Lordship

ought to be subjected to a very searching cross-examination. It is clear, from the evidence of the French *avoué*, that under the commission there would be really no cross-examination at all.

Moreover, the Court will not issue a commission in a case in which the claimant clearly cannot succeed. The document on which this claim is based is not a bill of exchange by the law merchant, though it may be for the purposes of the Stamp Acts, but, if so, it is insufficiently stamped. It is not good as an equitable assignment, and the claim is barred by the *Statute of Limitations*.

[FRY, J.:—I think that at present I have only to consider

---

then referred to the medical evidence, and continued:—] As other evidence may be given on the matter on which the Plaintiff's own evidence is material, and as, in my opinion, we should not be doing justice to the Defendants in granting the application for a commission, unless we were quite satisfied that there would be serious risk to the Plaintiff in requiring him, if he wishes to give evidence in support of his case, to come over here and give it in the ordinary way, in my opinion the order cannot be supported. If, therefore, the Plaintiff's evidence is necessary to his case, he must give it in the ordinary way in Court, for, in my opinion, he has not made out that he cannot do so without serious injury.

I will add one word about the way in which this matter comes before us. No doubt it is a serious matter to differ from three learned Judges. But the Court of Appeal has constantly to deal with matters in which, if they were to rely upon their respect for the judgments of others, they would often have to affirm orders which they do discharge or reverse. It is the necessary duty of the Court of Appeal to decide and act for itself. No doubt if the Judges who decided this case had seen and heard the witnesses, and had arrived at their conclusion on this question of fact after seeing and hearing them, I should have hesitated to overrule that conclusion, we having before us only a note of what the witnesses said. But, in the present case, we have before us exactly the same materials as the Court below had, in fact more, because we have a further affidavit. In such a case, in my opinion, it is our duty to exercise our own judgment on the evidence, just as it would be our duty to exercise our own judgment on a question of law. We have before us the same materials as the Court below had, and it is our duty to decide whether the judgment of the Court below was or was not erroneous. In my opinion the decision must be reversed, and the order of the Court below discharged.

BAGGALLAY, L.J.:—

The order will be discharged with all the costs, both in the Divisional Court and before Mr. Justice *Stephen*, as well as the costs of the appeal.

Solicitors for Plaintiff: *Whateley, Milward, & Whitehead*, agents for *Whateley & Co., Birmingham.*

Solicitors for Defendants: *Van Sandau & Cumming*, agents for *Brook, Freeman, & Batley, Huddersfield.*

FRY, J.
1882
In re BOYSE.
CROFTON *v.* CROFTON.

whether the claim is made *bonâ fide*. I ought not to go into the merits now.]

There ought to be some statement of the nature of the evidence which the witness is expected to give.

Cookson, in reply:—

The evidence of the *avoué* shews that, if any cross-examination is desired, the Judge of the French Court will put the questions to the witness.

FRY, J.:—

The question I have to determine is whether the evidence shews that it is necessary for the purposes of justice that I should issue a commission to the French Court to examine M. *Gautier*.

The claim made by the applicant is upon a document of rather an extraordinary character signed by Mrs. *Boyse* in the year 1872, by which she purported to draw on the *Bank of England* at sight for the sum of £7000. That document appears to have been indorsed by her to M. *Gautier*, with whom she was living and passing as his wife, and afterwards to have been indorsed, in the year 1876, by M. *Gautier* to M. *Canonge*, in whose favour, in the year 1878, M. *Gautier* executed another instrument which may or may not create an equitable charge, or an assignment of some interest under the other document.

M. *Gautier* appears to me to be so mixed up with the whole transaction, that he is a person whose evidence it is very important for the Court to have. If I were now trying the claim I should certainly desire to see M. *Gautier* in the box, in order that I might hear what he might have to say on all the matters (and they are numerous) which are in controversy between the parties.

It is said by the Respondent that this is not a *bonâ fide* application, and that therefore it ought not to be granted. That argument assumes a double aspect. In the first place, it is said that M. *Gautier* is the person who is really making the claim and that therefore his not coming forward to give evidence shews a want of good faith. But, according to the evidence, which is not contradicted, M. *Gautier*, although undoubtedly interested in the sum in question, is not the only person interested; M. *Canonge*

has an interest to some extent as a trustee for third persons, and it would be a hardship if they were treated as being in the same position as M. *Gautier* himself. In the next place, it is said that the claim is so manifestly bad on the face of the instrument that I ought to hear an argument on the preliminary question of the validity of the claim. According to the view which I take, it is my duty to attend to the nature of the case and the arguments upon it so far only as to see whether there is any question to be tried, but not now to determine questions on the construction or the nature of the instrument, or on the *Stamp Act*, or the *Statute of Limitations*, which, if they were determined in favour of the respondent, would be fatal to the claim, but, if they were determined against him, would leave the commission to go. Therefore, I intimated my opinion during the argument that I ought not to treat this as the hearing of the case on those various points. It is obvious too that some of those questions will turn on the facts as they are ultimately proved.

But then comes the question, Is a commission issued to the French Court a satisfactory mode of getting the evidence of M. *Gautier?* It is a matter of great suspicion that M. *Gautier* has not come forward and made an affidavit, because, according to the applicant's own case, he is largely interested in the success of the claim, and therefore I cannot but regard *Gautier* as a person not anxious to disclose the truth, at any rate in the ordinary way of making an affidavit in support of a claim in which he is interested. It is said that he declines to give evidence before an English Commissioner, but is willing to do so before the French Court. He is a Frenchman residing abroad, and is entitled to take his own course in such a matter; but I must have regard to the result of issuing a commission to the French Court. In that case, as the evidence shews, the English agents and solicitors and counsel will not be permitted to take any part in the proceedings, but the matter will be conducted by the French *avoué*, who no doubt is perfectly competent. The judge will put the questions to the witness, and will no doubt do his duty with great ability, but the judge will determine what questions are to be put. Now in a case of this kind I do not feel inclined to delegate to any foreign tribunal the duty of deter-

FRY, J.
1882
In re
BOYSE.
CROFTON
v.
CROFTON.

mining what questions ought to be put, and for this reason. M. *Gautier* is a man about whom one cannot help having suspicions. He will probably be a friendly witness. He has been concerned in all the various steps of these complicated transactions, and he is a witness who ought to be subjected to the most drastic cross-examination, and I am not inclined to leave it to any other tribunal to determine what questions should be put to him. In coming to that conclusion, I desire to say most distinctly that I do not feel the slightest want of respect for the French Courts or the French Judges. I have no doubt that the French Courts perform their duties in the best manner possible. But we know that the habits and practice of the French Courts are different from our own, and I repeat that in a case of this kind, when the cross-examination of this witness is most material, and will alone enable me to judge of the effect of his examination-in-chief, I decline to delegate my discretion to any other tribunal. If under the commission the witness would have been subject to cross-examination in the ordinary way, I should have thought it desirable to issue it. But, seeing that that would not be so, but that I should be leaving to the discretion of a French tribunal what questions should be put, it does not appear to me necessary or expedient that the commission should go. I therefore refuse the application with costs.

Solicitors for Applicant: *M. Abrahams & Co.*
Solicitors for Administrator: *Gregory, Rowcliffes, & Co.*

W. L. C.

FRANCIS *v.* HAYWARD.

KAY, J.

1882

April 24, 28.

[1881 F. 108.]

Easement—Right to use Fascia—Adjoining Tenement—Common Landlord.

The Plaintiff claimed the sole right to use a fascia which was erected on the adjacent house, rented from the same landlord, on the ground that, as it had been used by him and his predecessors in title for thirty years he had an easement in it appurtenant to his house; and that such easement was necessary for the comfortable enjoyment of the premises. The Defendant, whose lease was granted to him when the fascia was in existence, but prior to the lease to the Plaintiff, without any reservation of the easement, claimed to hold his premises without being subject thereto:—

Semble, upon the construction of the leases and the nature of the premises, that the Plaintiff's house was let subject to the easement, and the Defendant's was let liable to it, but whether that was so or not,

Held, upon the long existing practice, that the landlord had himself treated the fascia not merely as an easement but as a portion of the Plaintiff's tenement constructed for the use thereof, by the common landlord.

THE Plaintiff was the lessee of certain premises called 152, *Aldersgate Street*, in the city of *London*.

They consisted of a dwelling-house and two places of business, situate in a court communicating with the western side of *Aldersgate Street* by an entry.

The dwelling-house was at the bottom of this court facing towards *Aldersgate Street*.

There was a warehouse on the north side of the court and a shop on the south side. The entry passed under, as to one half of its width, the house now occupied by the Defendant, and as to the other half, under the adjoining house.

Both these houses faced into *Aldersgate Street* and were on the west side of that street, and were numbered respectively 153 and 151, the Plaintiffs' premises being No. 152, *Aldersgate Street*. The entry was closed by a wrought-iron gate which was hinged into staples fixed in the wall of Defendant's house and closed the entry to the court when shut. Above this gate was a fascia in *Aldersgate Street*, 8 feet long by 2 feet 6 inches in depth, formed of cement plastered on the brickwork of the Defendant's

KAY, J.
1882
FRANCIS
v.
HAYWARD.

house as to one half of it, and of the adjoining house, No. 151, as to the other half of it. This fascia, according to the evidence, was formed for the purpose of painting thereon the number, name of occupier, and business of the Plaintiff's premises in the court. It had existed before and ever since 1852. In and previous to the year 1855, the name of *William Woodger*, with the words "Veterinary Forge, Farrier, Horses carefully shod," were on this fascia, together with the number of Plaintiff's premises, which was then No. 132, but since altered to No. 152.

On the 9th of November, 1855, a lease was made of these premises to three persons named *Roberts, Brown, & Bright*, for twenty-one years by this description: "All that messuage or tenement, yard, buildings, and premises situate and being on the west side of *Aldersgate Street*, and known as No. 132 in the said street, as the same were lately in the occupation of *William Woodger* or his undertenants, and now in the occupation of" *Roberts, Brown, & Bright*, or their undertenants; "together with all ways, waters, watercourses, lights, easements, profits, privileges, advantages, and appurtenances whatsoever to the said messuage or tenement and premises hereby demised, belonging, or in anywise appertaining."

Afterwards, *Roberts* assigned his interest to his co-lessees, then *Brown* assigned his to *Bright*.

In 1865, *Bright* assigned this lease to *Bull*, and from time to time as the occupiers changed the names on the fascia were changed to correspond, *Bull's* name being put up after his purchase.

On the 5th of August, 1874, No. 153 was let to the Defendant *Hayward*, by the description "all that messuage and public-house situate, lying, and being on the west side of *Aldersgate Street*, called or known by the name or sign of the *Coach and Horses*, and also all the yards, outhouses, stables, and appurtenances thereunto belonging, together with all cellars, vaults, areas, ways, paths, passages, lights, easements, waters, watercourses, commodidities and appurtenances whatsoever to the said messuage or tenement and premises belonging or in anywise appertaining, or with the same or any part thereof now or heretofore, or lawfully or usually used, holden, occupied, or enjoyed, as the same premises are now in the occupation of the said *John Perry Hayward*." On

the 30th of September, 1876, the premises in the court yard were let to the Plaintiff for twenty-one years by the description of No. 132, *Aldersgate Street*, "as the same are now or were lately in the occupation of *Frederick Bull*." The boundaries were then given, and there followed the usual general words. In 1878, by a deed of the 12th of January, No. 153 was relet for a further term to the Defendant *Hayward* by the description "all that messuage and public-house situate, lying, and being on the west side of *Aldersgate Street*, called or known by the name or sign of the *Coach and Horses*," and with the further general words used in the former lease of 1874, ending with the words "as the same premises are now in the occupation of the said *John Perry Hayward*." After this lease, on the 20th of February, 1880, plans were prepared of certain alterations in the Defendant's premises. At first it was not intended to interfere with the fascia, but on the first of October, 1880, as appeared by a pencil date on the plan and the evidence of the architect, for the purpose of completing the ornamental design of the improvements of the Defendant's property, what was called in the evidence a truss or ornamental projection of stone was proposed to be inserted in the fascia at the northern extremity of the Defendant's building, and that part of the fascia which was south of the truss it was proposed to cover with glass.

The glass had not been put there, but the truss had, it partly obliterated the name of *Hutchinson*, which was then painted on the fascia, and on the 21st of January, 1881, this action was commenced by the present lessee of No. 152 seeking to have the Defendant restrained from so interfering with the fascia and for damages.

Higgins, Q.C., and *Warmington*, for the Plaintiff:—

We submit that the right to use this fascia was an easement originally granted by the landlord of the house to the Plaintiff's predecessors, and that having been enjoyed in conjunction with those premises ever since 1852, the Defendant cannot claim to use it. There was a distinct grant of this easement by the general words used in the lease, and it was necessary for the full enjoy-

KAY, J.
1882
FRANCIS
v.
HAYWARD.

ment of the premises, because as the house was actually situated in the court, and numbered in conjunction with the houses facing *Aldersgate Street*, there was no other method of indicating the position of the house. The general words in the lease to the Plaintiff contained the words "as the same premises are now in the occupation of the tenant," and there is evidence to shew that the premises, including the fascia, were then, and had been for many years, in the occupation of the Plaintiff and his predecessors. It was held in a case very similar to this—*Moody* v. *Steggles* (1)—that a grant of an easement by the defendant's predecessors in title to the plaintiff's predecessors in title must be presumed, where a sign-board had been fixed up to the defendant's house by the plaintiff for upwards of forty years. In *Ewart* v. *Cochrane* (2) Lord *Campbell* laid it down that upon a severance of two properties anything which was used and was necessary for the comfortable enjoyment of the part granted should be considered to follow from the grant, and *Hall* v. *Lund* (3) is to the same effect.

Rigby, Q.C., and *Onslow*, for the Defendant:—

There is distinct authority opposed to the Plaintiff's claim in this case. *Gayford* v. *Moffatt* (4) decided that the lessee of one close could not by user acquire an easement over another close belonging to the same landlord, and in *Brett* v. *Clowser* (5), it was held that a way which was not a way of necessity did not pass to *Brett* by the general words in his lease, and that the defendant *Clowser* was not estopped from denying the existence of an alleged right of way by having allowed a former tenant to use it while he was the occupier of the house. So in *Polden* v. *Bastard* (6), where the owner of two houses allowed the tenant of one of the houses to use a pump in her yard, it was held under a devise of the adjoining house "as now in the occupation of the tenant," that the right to use the pump did not pass.

In this case the right of way under the Defendant's house might well continue in the Plaintiff, because it was a way of neces-

(1) 12 Ch. D. 261.
(2) 4 Macq. 117, 122.
(3) 1 H. & C. 676.
(4) Law Rep. 4 Ch. 133.
(5) 5 C. P. D. 376.
(6) Law Rep. 1 Q. B. 156.

sity, but that does not apply to the right of having a fascia erected upon the front of the Defendant's house. Moreover, here the Defendant had a lease granted prior to the Plaintiff's lease, which contained very full general words, including all easements, &c., and the owner having granted that lease could not, by a subsequent lease to the Plaintiff, dispossess the Defendant of what he had previously granted. For this contention *Martyr* v. *Lawrence* (1) and *Baird* v. *Fortune* (2) are authorities.

Higgins, in reply.

KAY, J. :—

This case has been put in the pleadings and argued chiefly on the ground that the Plaintiff is entitled to use the fascia in question as an easement appurtenant to his premises, and this view of the matter raises a question of some difficulty. Lord *Campbell* in *Ewart* v. *Cochrane* (3) states "the law of *England* to be—that when two properties are possessed by the same owner, and there has been a severance made of part from the other, anything which was used and was necessary for the comfortable enjoyment of that part of the property which is granted shall be considered to follow from the grant if there are the usual words in the conveyance." "I do not know," he says, "whether the usual words are essentially necessary, but where there are the usual words, I cannot doubt that that is the law."

If this was an easement it seems to me clearly to be one of the nature there referred to, viz.: which was used and was necessary for the comfortable enjoyment of the property, and accordingly it would pass by the grant in the lease of 1855, and also *primâ facie* by the lease of 1876.

But then it is argued that, however that might be under the lease of 1855, at the time when the lease of 1876 was granted, the lessors had no longer the power to grant this easement, because by the previous lease of 1874 they had granted No. 153, which would be the servient tenement, to the Defendant *Hayward*, subject only to the then unexpired lease of 1855, and the case of

(1) 2 D. J. & S. 261.
(2) 4 Macq. 127.
(3) 4 Macq. 122.

KAY, J.
1882
FRANCIS
v.
HAYWARD.

Martyr v. *Lawrence* (1) certainly seems to be an authority for that contention. The words "as the same are now in the occupation of *A*," were there held not restrictive, so as to subject the demised premises to an easement to which they had been liable during *A.'s* occupation. Also in the case of *Baird* v. *Fortune* (2), it was decided that the words "as the same now is or was sometime possessed by *Thomas Fowlis* with parts and pertinents" did not include by way of grant a right to take seaweed from the seashore over intervening land of the vendor, although *Fowlis* had had such a right. However it is plausibly argued that in the latter case (which was decided the same day, and by the same tribunal which decided *Ewart* v. *Cochrane*) (3), the easement in question was not a continuous and apparent easement, and was not necessary for the comfortable enjoyment of the property sold, and this distinguished the decision from *Ewart* v. *Cochrane*, and from this case.

Notwithstanding these authorities I am strongly of opinion that sufficient appears upon the face of the leases and from the nature of the properties in this case to entitle the Court to hold, even if this be treated as an easement, that No. 153 was let subject to that easement, and No. 152 with the advantage of it. However, there is another view of the case which I pressed upon counsel during the argument, and which seems to me on reflection to be the true way of determining the respective rights of Plaintiff and Defendant. The lessors, being the owners of all these three properties Nos. 151, 152, and 153, had of course an absolute right to determine what should be the divisions between them, and what should constitute the tenement No. 152, and it seems to me that as well by the deeds as by the practice which according to the evidence has existed ever since the year 1852, this fascia has been considered and treated not merely as an easement but as a portion—and a not unimportant portion—of the tenement No. 152. It is obvious that the Plaintiff's premises having been during all that time used to some extent as business premises, and being numbered 152 *Aldersgate Street*, it was essential that there should be some place in that street upon which the number and

(1) 2 D. J. & S. 261. (2) 4 Macq. 127.
(3) 4 Macq. 117.

the business name might be put up, and I have the direct evidence of the Defendant's architect, which seems to me to be completely corroborated by the plans and photographs which have been proved, that this stucco fascia over the Plaintiff's gateway was obviously constructed for the Plaintiff's premises as the place where the name of the occupier and the number of his premises were to be painted up.

I am not bound by any law to treat that as a mere easement. It is quite as consistent with law to hold that the stucco fascia is part of the tenement No. 152, though the wall behind it is the wall of the messuage let to the Defendant, as to hold that the gate immediately under this fascia and the staples of that gate belong to the Plaintiff, although those staples are firmly fixed into the Defendant's premises. I therefore hold that the Plaintiff is entitled to this fascia not as a mere easement, but as part of the tenement demised to him, it having been constituted part of that tenement by the common owner of the premises both of the Plaintiff and Defendant, and I accordingly direct the Defendant at his own expense forthwith to remove the truss, and to restore the fascia to its former condition, and I order him to pay the costs of the action, but I do not think fit to direct any inquiry as to damages.

Solicitors: *M. Webb & Son; A. G. Ditton.*

T. W. G.

KAY, J.

1882

June 7.

WATSON *v.* HOLLIDAY.

[1881 W. 1439.]

*Bankruptcy—Proof for Damages—Account—Infringement of Patent—Proof for Profits—*32 & 33 *Vict. c.* 71, *s.* 31—*Not demurring—Costs.*

Where a patentee is entitled to recover the amount of profits made by infringing his patent, the amount of those profits is not recoverable in the nature of damages, but as money had and received to his use; and he is therefore not prevented by the 31st section of the *Bankruptcy Act* of 1869, from proving in the bankruptcy of the infringer for the amount of those profits:—

When a bankrupt defendant does not appear at the hearing, and his trustees appear and defend, they are liable to the costs of the action.

THIS action was brought by *Leonard Watson* to restrain the infringement by the Defendant, *J. N. Holliday*, of a patent for steam steering apparatus granted to *Watson* in 1878. The Plaintiff claimed an injunction and an account of profits, or, in the alternative, damages. After the action was begun, *Holliday* filed a petition for liquidation of his affairs, *H. Rawlings* and *R. R. Edington* were appointed trustees of his estate, and a composition of 7*s.* 6*d.* in the pound was accepted. *Watson* then obtained an order to carry on the suit against the trustees, and amended his statement of claim by making them Defendants. *Holliday* had delivered a statement of defence; but *Rawlings* and *Edington* did not deliver any statement of defence. The action now came on for trial.

Rigby, Q.C., and *A. T. Watson*, for the Plaintiff.

Witnesses were examined for the Plaintiff, and were cross-examined for the Defendants *Rawlings* and *Edington*.

Holliday did not appear.

Higgins, Q.C., and *H. Percival*, for *Rawlings* and *Edington*:—

As against these Defendants this is in fact an action for unliquidated damages, and is therefore within the prohibition of sect. 31 of the *Bankruptcy Act* of 1869 (32 & 33 Vict. c. 71):

In re Newman (1); *Ex parte Peacock* (2). An account of profits is virtually the same, the claim being founded on tort: *Ex parte Baum* (3).

Rigby:—This is not exactly a tort, and is more in the nature of a fraud, where damages may be proved for against a bankrupt. At all events the Plaintiff is entitled to an account of profits made through the fraud and misconduct of *Holliday*, who has got what the Plaintiff says ought to be his. The remedy is equitable, and there is no question for a jury as in the case of unliquidated damages: *Ex parte Adamson* (4).

Higgins, in reply.

KAY, J.:—

The bankrupt or *quasi* bankrupt does not appear at the hearing of this case, and although he has pleaded that the patent is invalid from want of novelty he has given no particulars of objection, and consequently, even if he were here, it would not be possible for him to put in any evidence in support of that plea. The Plaintiff has proved sufficiently the infringement. The evidence satisfies me that *Holliday* was guilty of infringement, and accordingly I am bound to grant an injunction against him to prevent his further infringing this patent.

With regard to the other two Defendants a rather curious question has been raised. It seems that after the institution of this action a petition in bankruptcy was filed against *Holliday*; and on the 26th of August by resolutions at a meeting of the creditors, an arrangement was made for liquidation on the basis of the creditors receiving 7*s.* 6*d.* in the pound. The trustees were to deal with the estate in order, as I understand, under those resolutions to provide that 7*s.* 6*d.* in the pound.

After this took place, the statement of claim was amended, and the trustees in liquidation were made Defendants, and relief is prayed against them, the relief being an account of all the articles manufactured in infringement of the patent and of the

(1) 3 Ch. D. 494.
(2) Law Rep. 8 Ch. 682.
(3) Law Rep. 9 Ch. 673.
(4) 8 Ch. D. 807.

KAY, J.
1882
WATSON
v.
HOLLIDAY.

gains and profits made thereby, and there is in the alternative a claim for damages; and there is a claim for costs. The point raised by the trustees is this, that as under the 31st section of the *Bankruptcy Act* of 1869 "demands in the nature of unliquidated damages arising otherwise than by reason of a contract or promise shall not be provable in bankruptcy," it follows that the account of profits made by *Holliday* in infringement of this patent is a demand not provable in bankruptcy. Now the first question is, whether this is a demand in the nature of unliquidated damages, and if it be so, clearly it does not arise by reason of contract or promise. It arises by reason of that which is in law a tort, namely, the infringement of the patent, and, accordingly, if it be a demand in the nature of unliquidated damages, it is a demand that would not be provable against these trustees. The trustees have put in no defence, and they rely entirely on the statements in the statement of claim. The most convenient course, and the most proper course in every respect, as it seems to me, would have been to have raised the question by demurrer. That, however, they have not done, but they say, "We are now at the hearing, and if, upon the statement of claim, the Court sees that there is no case at all against us, the Court will be bound not to grant any relief against us." Probably that is a true view of the law. If the Court came to the conclusion upon the statements in the statement of claim that no case whatever was made for relief against the trustees, it would be the duty of the Court to refuse relief, and then it would be only a question of costs. But long before the Court of Chancery had power to grant damages in any form it was the custom of the Court of Chancery to decree an account in patent actions. That of itself is enough, or goes far to shew, that, at any rate, an account of profits is not damages. But, then, it is argued, that the Act of Parliament does not say "damages," but "in the nature of unliquidated damages," and this claim is in the nature of unliquidated damages. Now is that so? I think that the cases which have been decided in the House of Lords shew that it is not so. In the case of *Neilson* v. *Betts* (1), Lord *Westbury* says thus: "My Lords, I have only farther to observe that the decree

(1) Law Rep. 5 H. L. 1, 22.

of the Court below directed, not only an inquiry as to damages, but also an account of profits. The two things are hardly reconcilable." Now if I stop there that would shew that Lord *Westbury's* opinion was that an account of profits was entirely different from an inquiry as to damages, but he goes on to say, "for if you take an account of profits you condone the infringement;" and their Lordships called, in that case, on the Respondent's counsel to elect which they would adopt. Now, what does that mean? "You condone the infringement." Surely it must mean that by electing to take the profits which the tortfeasor has made by infringing the Plaintiff's patent, he adopts the act of the tortfeasor, and says, "You shall be treated in equity as having done this work on my behalf, you have been agent or trustee for me in doing it, and I therefore will have—not damages, but the profits which you have made, and I claim them against you." That case was followed in *De Vitre* v. *Betts* (1), where the only question argued and decided was whether there could be both an account of profits and an inquiry as to damages. It seems that in *Hill* v. *Evans* (2) both had been directed by Lord *Westbury*, and it was argued that this was an authority which the House of Lords would follow, and would direct both.

But Lord *Chelmsford* gave a considered judgment in this case, and he was followed by Lord *Colonsay* and Lord *Cairns* to the effect that it was not right to give the double inquiry, but that the parties ought to be put to their election which to take—profits or damages. Now both those cases contrast profits and damages in a very clear way. I am referred to the case of *In re Newman* (3), which proves that damages recovered in an action of tort are not, under sect. 31, provable in bankruptcy; but for that proposition authority was hardly wanted, the words of the section being sufficiently clear. On the other hand, a reference is made to *Ex parte Adamson* (4), where Lord Justice *James* says: "In cases of fraud or breach of trust, which is often only one form and instance of fraud, there never was any division of liability between the tortfeasors; every person participating in the tort was liable to make good the whole; the liability of each

(1) Law Rep. 6 H. L. 319.
(2) 4 D. F. & J. 288.
(3) 3 Ch. D. 494.
(4) 8 Ch. D. 807, 820.

KAY, J.
1882
WATSON
v.
HOLLIDAY.

in equity was for the whole amount. 'And the proof in bankruptcy was exactly commensurate with that liability, it being the established rule in bankruptcy that every debt that a person could, either in his own name or in the name of any other person, recover at law or in equity, was a provable debt in bankruptcy." It is quite true that Lord Justice *Bramwell* differed in that case, but the majority of the Court decided according to the judgment of Lord Justice *James*, and the decision was that a fraud by misrepresentation, for which in equity the person making the misrepresentation was bound to make compensation, created what might be called a debt in equity rather than a liability to damages, and that the claim, being in the nature of an equitable debt, might be proved notwithstanding the 31st section.

That case is not exactly in point here. This is not a case of fraud or breach of trust. It is a case in which the claim undoubtedly arises from that which is properly called in legal language a tort; and if I were to hold the claim to be for damages, or in the nature of damages, I must hold that the 31st section takes away that right of proof, which I cannot doubt existed in respect of this equitable claim, before that section was passed. In my opinion it is not right to treat that relief, which was given by the Court of Equity, before it had any jurisdiction to give relief in the nature of damages, as being damages or in the nature of damages. The words which I have read from Lord *Westbury's* judgment in the case of *Neilson* v. *Betts* (1) seem to me entirely inconsistent with that view. He does not treat an account of profits as a remedy in the nature of damages. He treats it as being more like an equitable claim for money had and received, taking the person who has committed the tort as having been in fact in the position of an agent or trustee for the Plaintiff.

On the whole, therefore, it seems to me that this is a claim which does not come within the first words of sect. 31 of the *Bankruptcy Act* of 1869, and I must make a declaration that the Plaintiff is entitled to an account of profits made by the infringement of this invention since the disclaimer was filed, and I direct that account of profits and give leave to prove in the liquidation for the amount.

(1) Law Rep. 5 H. L. 1, 22.

There remains the question of costs. Now undoubtedly the usual rule is that trustees in bankruptcy who take up the defence of an action which was commenced by the bankrupt, put themselves entirely in his place with respect to costs, and it seems to me that I cannot make any exception to that rule in such a case as this. The trustees have not chosen to demur, and they have not put in any defence; but the case is brought to a hearing, and on the hearing they have actually cross-examined the witnesses, apparently with a view to make out, if they could, that there had been no infringement since a certain disclaimer, which issue I have determined against them. It seems to me that they have taken up the defence of the bankrupt, although they have not put in any pleadings, and they, therefore, according to the ordinary rule, have made themselves liable to costs, and I must direct them to pay the costs of the action.

Solicitors for Plaintiff: *Shum, Crossman, & Co.*, agents for *W. A. Kidson, Sunderland.*

Solicitors for Defendants: *Clarke, Rawlins, & Clarke,* agents for *J. H. Rennoldson, South Shields.*

C. M.

END OF VOL. XX.